EXTRACT FROM BY-LAWS

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down. or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.

No. 8893

United States Circuit Court of Appeals

Vol 211 3

Also Vol 2112

For the Ninth Circuit.

CHARLES E. SCHMIDT, GEORGE LANDELL, Executor of E. A. LANDELL, Deceased, CLARENCE LOEBENTHAL, Trustee of Bernard Loebenthal, and WALTER L. HAEHNLEN Intervening Petitioners on behalf of themselves and other minority stockholders of the Northern Pacific Railroad Company,

Appellants,

vs.

UNITED STATES OF AMERICA and NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, NORTHERN PACIFIC RAILROAD COMPANY, a Corporation, NORTHERN PACIFIC RAILROAD COMPANY, as Reorganized in 1875, NORTHWESTERN IMPROVEMENT COMPANY, a Corporation, BANKERS TRUST COMPANY, a Corporation, GUARANTY TRUST COMPANY, a Corporation, CITY BANK FARMERS TRUST COMPANY, a Corporation,

Appellees.

Transcript of Record

In Two Volumes

VOLUME II

Pages 653 to 1288

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PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

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Upon Appeal from the District Court of the United States for the Eastern District of Washington, Northern Division.

PARKER PRINTING COMPANY. 545 SANSOME STREET. SAN FRANCISCO

XXI.

Miscellaneous Sub-Divisions

1. Subdivision XIV.

It is alleged the purpose of Congress in chartering the Northern Pacific and granting to it lands was that all its properties should be used primarily to build a line of road and telegraph. That under certain contracts with the Oregon and Trans-Continental Company, and various branch line companies, the Northern Pacific dissipated its funds in the construction of branch lines, and that the contracts were collusive and fraudulent devices whereby the Oregon and Trans-Continental Company received illegal profits at the expense of the Northern Pacific. The argument is the transactions were ultra vires. This may be conceded, but the Government is not now seeking to restrain the company to the exercise of powers within its charter. The most that can be said is that at one time the Government might conceivably have had grounds to restrain the contracts denounced and to require the company on proper terms to relieve itself thereof. It is not argued that these contracts are now in existence or that anything illegal is now being done under them, or has been for many years. It is difficult to see therefore what remedy the Government can now have. It is said in argument that the contracts were fraudulent and intended to milk the Northern Pacific for the benefit of insiders in that company. If these charges were well pleaded it is not inquirable into in this case under plain, well settled principles,

declared by the Supreme Court in United States v. Union Pacific Railroad Company, 98 U. S. 569. The facts alleged can have no bearing [438] whatever in the adjustment of the land grant. It does not go either to the settlement of the grant or to what the company has earned thereunder.

I sustain the demurrer to this subdivision.

2. Subdivision XV.

It is alleged that large areas of the granted lands were diverted from the purpose intended by Congress in the grant and that they were not sold under bona fide contracts for the purpose of raising money in aid of the construction of the road.

For manifest reasons the demurrer to this subdivision is sustained.

3. Subdivision XXIX—A.

It is alleged that various patents were erroneously issued to the railroad company because the Land Department treated the lands as coming under the grant when, in fact, at the dates of the different locations they were within military or Indian reservations, and therefore excluded from the grant. Of course, indemnity selections in lieu of such losses might have been made.

To this subdivision a demurrer has been interposed and a plea of res judicata based upon United States v. Northern Pacific Railroad Company, et al. (N. P. Exhibit 23). An additional plea of res judicata is interposed as to lands within the Yakima Indian Reservation included in this subdivision

based on the case of United States v. Northern Pacific Railway Company, 227 U. S. 355.

Considering the plea of this case first, I think it cannot be questioned that it did thereby definitely adjudicate [439] as between the Government and the Railway Company the southern and western limits of the reservation. If these lands are outside those limits it certainly must be deemed as adjudicated that the patents to the railway company were not in error. I can find nothing in the record which enables me to determine that these lands are outside the reservation as established in this case, although counsel on both sides seem to admit it. It may be I have overlooked something. However, the result would not be changed.

For the reasons previously and several times stated I overrule both these pleas.

Again, I do not wish to be misunderstood. Some of these lands are admitted to have been erroneously patented. What effect will be given and what rights, if any, the Government may have in respect of such errors can be determined only on the final hearing. It may eventuate on the final adjustment that the doctrine expressed in United States v. Northern Pacific Railroad Company, et al. supra, may be applicable both as a principle of law and as an adjudication, and it may likewise turn out that United States v. Northern Pacific Railway Company, 227 U. S. 355, supra may be applicable as an adjudication. I am only holding now that I cannot determine these questions at this stage.

4. Subdivision XXX.

It alleges certain conclusions of the pleader as to the relief the United States is entitled to because of matters alleged in prior sub-divisions of the bill.

I do not see any possible place for it in the bill, nor do I see how either party is to be injured by its remaining [440] in or going out. The conclusions stated are either right, or wrong, and it makes not the slightest difference which. But as the question is raised I shall sustain the demurrer.

5. Subdivision XXXIII.

It is alleged that the railroad company was required by the Act of July 15, 1870 (16 Stat. 305) to re-imburse the United States for the cost of surveys within the grant and that prior to the decision in Northern Pacific Railroad Company v. Traill County, 115 U. S. 600, it refused to pay to the United States these costs. That case was decided December 7th, 1885. It is not alleged that the company did not ultimately pay the fees, but merely they were not paid until the Supreme Court had decided that company were required by the Act to make payment. I can see no possible effect the facts thus alleged have upon this case. No relief is sought, and patently none could be had. I sustain the demurrer to this sub-division.

6. Subdivision XXXIV.

I will overrule the demurrer to this sub-division. I do this solely because of the misunderstanding that has arisen between counsel as to whether the question is open at this time. I do not think it is a

matter of any consequence whether the demurrer is sustained or overruled. On the final hearing neither party will be prejudiced by this ruling.

7. Subdivision XIX.

I sustain the demurrer to this sub-division upon the ground that it is wholly immaterial. [441]

XXII.

Plea of Innocent Purchase
by
Bankers Trust Company and City Bank
Farmers Trust Company.

Of the three trust companies named defendants the Guaranty Company has disclaimed by proper answer any interest in the subject matter of the suit. Each of the others has filed a separate answer.

Defendant, Bankers Trust Company is trustee under a mortgage executed by the Northern Pacific Railway Company under date of November 10, 1896, known as "the prior lien mortgage", to secure a present outstanding principal amount of bonds in the sum of $107,330,600. These bonds are issued in both coupon and registered form, coupon bonds in denominations of $500 and $1000, and registered bonds in denominations of $100 and such multiples thereof as may be prescribed by the railway company. The greater portions of these bonds are in coupon form and pass by delivery. No record, therefore, exists by which the identity of the present holders may be accurately determined. Some knowledge, however, is gained from the ownership certi-

ficates which individual bond holders and certain others are required to file under Federal income tax regulations. Corporations are not required to file such certificates and there is, therefore, as to the greater part of the holdings of these coupon bonds no record. The evidence shows, however, the distribution of these bonds as of December 1, 1931, as follows:

I. Prior Lien Railway and Land Grant Gold 4% Bonds [442]

Outstanding as of December 1, 1931:		
Coupon		$ 77,807,000.00
Registered		29,523,600.00
Total		$107,330,600.00
Amount of Interest paid on said Prior Lien Bonds during 1931:		
To corporations (which, under present income tax regulations, are not required to file ownership certificates)		$ 2,525,924.57
To individuals and others who did file ownership certificates		1,730,132.43
Total		$ 4,256,057.00
The ownership certificates filed in connection with the payment of said $1,730,132.43 were as follows:		
Foreigners	$1,184	
Citizens and residents of the United States	2,468	
Fiduciary and Trustee accounts	2,015	
Partnerships	19	
Individuals classed as exempt	749	
Total number of ownership certificates	6,435	

City Bank Farmers Trust Company is trustee under the "General lien mortgage" dated November 10, 1896, executed by the Northern Pacific Railway Company to secure a bond issue in the principal amount of $190,000.000. Of this sum $130,000,000 principal amount was reserved to retire the prior lien bonds. The remaining $60,000,000 principal amount had been authenticated and delivered to the Trust Company, of which amount $54,451,500.00 principal sum is now outstanding in the hands of the public.

II. General Lien Railway and Land Grant Gold 3% Bonds

Outstanding as of December 1, 1931:

[443]

Coupon	$ 43,188,500.00
Registered	11,263,000.00
Total	$ 54,451,500.00

Amount of interest paid on said General Lien Bonds during 1931:

To corporations (which, under present income tax regulations, are not required to file ownership certificates)	$ 1,008,733.83
To individuals and others who did file ownership certificates	$ 630,247.17
Total	$ 1,638,981.00

The ownership certificates filed in connection with the payment of said $630,247.17:	
Foreigners	407
Citizens and residents of the United States	1,407
Fiduciary and Trustee accounts	1,347
Partnerships	20
Individuals classed as exempt	645
Total number of ownership certificates	3,826

As in the case of the prior lien mortgage no figures are available as to the number of corporate holders.

In the answer of each trustee company it is pleaded that by virtue of the mortgage to it the holders of the bonds outstanding under the mortgage are innocent holders and by separate answer that the trustee company itself is. As the legal questions raised under this answer are the same I will dispose of them together.

First: I hold that the trustee companies are not innocent purchasers.

Second: I hold that, as to all place lands patented or certified for patent prior to the date of the mortgages, the holders of the outstanding bonds are innocent purchasers. [444]

Third: So, likewise, are the bond holders innocent purchasers of all indemnity selections made and approved prior to the date of the mortgage, except such selections in lieu of place lands that did not, and as matter of law could not, pass under

the grant. The indemnity selections allowed for claimed losses within the place limits where the railroad parallels the line of the Portage, Winnebago & Lake Superior Railroad Company are within this exception.

Fourth: I think that the bond holders are likewise innocent purchasers of all place lands actually earned by the railroad company and which passed under the terms of the grant, even though not at the date of execution and sale actually patented or certified. Thus the lands classified under the Mineral Classification Act which were, in fact, not mineral in character, were at that date actually earned and had passed. If by fraud of the railway company the classification was, in whole or in part, wrong, the trust companies are not affected thereby except that the Government may have as against them, as well as against the railway company, a reclassification to determine what lands were, in fact, nonmineral and, therefore, did in fact pass under the grant.

The foregoing views will require that these pleas be sustained in part, and overruled in part. I shall not extend this report by a discussion of the reasons for my holdings on these pleas. If I am correct on the rulings made in respect of the rights of the railway company, of course, the pleas become immaterial except as applied to those lands falling within the rule I followed in discussing the questions in connection with the Portage, Winnebago & Lake Superior Grant. If, [445] on the other hand,

my views are unsound, then application of the doctrine of innocent purchaser, either as I have held or as the Court may find it should be held, can be taken up.

[Endorsed]: Filed May 31, 1933. [446]

[Title of District Court and Cause.]

EXCEPTIONS OF DEFENDANTS, NORTHERN PACIFIC RAILWAY COMPANY, A CORPORATION, NORTHERN PACIFIC RAILROAD COMPANY, A CORPORATION, AND NORTHWESTERN IMPROVEMENT COMPANY, A CORPORATION.

Now come the defendants Northern Pacific Railway Company, a corporation, Northern Pacific Railroad Company, a corporation, and Northwestern Improvement Company, a corporation, and take the following exceptions to the report of the Special Master, Honorable Frank H. Graves, filed with the clerk of this Court on May 31, 1933:

I

The above named defendants except to the recommendation on page 36 of said report that these defendants' general motion to dismiss be denied. The Master's holding is based upon his conclusion that if the motion were sustained, there could be no accounting of the grant (Report pp. 35, 36) and on the further conclusion (Report pp. 34, 35) that the

Government may have the grant finally adjusted by this Court. The position of these defendants is that final adjustment of the grant is an administrative function and that the only questions with respect to adjustment of the grant that this Court may determine are those legal questions that are properly raised by the bill of complaint. Defendants' further position is however that the Court may and must do all the account- [447] ing of the grant that is necessary to determine how many acres and what acres have been expropriated by the Act of June 25, 1929, and the amount of compensation due defendants.

II

These defendants except to the Master's conclusion that the grant and contract made by the Act of July 2, 1864, were made by the Government in its sovereign capacity and that the Government in this suit is suing in its sovereign capacity to enforce sovereign rights, and that the plea of laches must therefore be overruled (Report pp. 36, 37).

III.

These defendants except to the conclusion of the Master that the pleas of res adjudicata made by these defendants should be overruled (Report, p. 38).

IV

These defendants except to the conclusion of the Master that defendants' demurrer to subdivision XXII of the bill of complaint should be overruled (Report, p. 95).

V

These defendants except to the failure of the Master to sustain defendants' plea of equitable estoppel to subdivision XXVIII of the bill of complaint (Report, p. 138).

GRAFTON MASON
D. R. FROST
D. F. LYONS
E. J. CANNON
Solicitors for Defendants,
Northern Pacific Railway Company,
a corporation,
Northern Pacific Railroad Company,
a corporation, and
Northwestern Improvement Company,
a corporation.

[Endorsed]: Filed June 20, 1933. [448]

[Title of District Court and Cause.]

EXCEPTIONS OF PLAINTIFF

Now comes the United States of America, the plaintiff in the above-entitled cause, and excepts to the report of Honorable Frank H. Graves, Special Master herein, filed in the office of the Clerk of this Court on the thirty-first day of May, 1933, in the following particulars, to-wit:

I.

The plaintiff excepts to the conclusion of the Master (page 31 of his report) that the clean-hands

doctrine does not apply to the defendants in this case.

II.

The plaintiff excepts to the conclusion of the Master (page 61 of his report) relative to Subdivisions VII and VIII [449] of the bill of complaint, wherein he states "that the respective demurrers to these subdivisions should be sustained."

III.

The plaintiff excepts to the conclusion of the Master (page 87 of his report) with reference to Subdivisions IX, X, XI and XII of the bill of complaint, wherein he states that "the demurrer should be sustained to each and every one of them" [and to the conclusion of the Master (page 211 of his report) with reference to Subdivision XI, where he states "I sustain the demurrer to this sub-division upon the ground that it is wholly immaterial."] Deleted—see stipulation filed 1/11/34.

IV.

The plaintiff excepts to the conclusion of the Master (page 87 of his report) relative to Subdivisions IX, X, XI and XII of the bill of complaint wherein he states that "the plea of acquiescence and waiver should be sustained."

V.

The plaintiff excepts to the conclusion of the Master (page 87 of his report) wherein he states that "the motion of the defendants railway company and

improvement Company to quash return of service on the railroad company as reorganized in 1875 should be sustained because I think there is no such concern in existence and never was and, hence, there was nobody who could be sued and of course nobody could be served."

VI.

The plaintiff excepts to the remark of the Master (page 87 of his report) with reference to the effect of the 1875 foreclosure proceedings upon the land grant under the terms of the Joint Resolution of May 31, 1870, wherein he states "I shall hold that the Government has no cause of complaint in that behalf." [450]

VII.

The plaintiff excepts to the conclusion of the Master (page 103 of his report) that defendants' plea of "estoppel by reason of the Yakima Indian transaction, and by reason of the years of recognition of the line by the Government," directed to Subdivision XXVI of the bill of complaint, should be sustained.

VIII.

The plaintiff excepts to the conclusion of the Master (page 111 of his report) that defendants' demurrer directed to Subdivision XXVI of the bill of complaint should be sustained.

IX.

The plaintiff excepts to the conclusion of the Master (page 122 of his report) that the demurrer

to Subdivision XXXV (inadvertently referred to by the Master as Subdivision XXV) of the bill of complaint should be sustained.

X.

The plaintiff excepts to the conclusion of the Master (page 146 of his report) with reference to Subdivision XXVIII of the bill of complaint, that defendants' demurrer to said Subdivision ought to be sustained.

XI.

The plaintiff excepts to the conclusion of the Master (page 161 of his report) relating to the subject-matter of Subdivision XXIX of the bill of complaint, to the effect that no reservation coming within Section 3 of the Act of July 2, 1864 was created by the Fort Laramie Treaty of September 17, 1851, and that the territories of the tribes referred to in said treaty remained Indian country within section 2 of the Act of July 2, 1864, whereas the Master should have concluded that the lands embraced [451] within said treaty were not "public lands" but were lands which the Indians were left free to occupy under treaty stipulations with the United States and were excepted from said Act of July 2, 1864 under the provisions of section 3 thereof.

XII.

The plaintiff excepts to the conclusion of the Master (page 164 of his report) relating to the subject-matter of Subdivision XXIX of the bill of

complaint, to the effect that no reservation for the Blackfoot tribes so as to bring their territory under section 3 of the Act of July 2, 1864 was created by the Blackfoot Treaty of October 17, 1855, and that the territory of said tribes continued to be Indian country until subsequently its status was altered, whereas the Master should have concluded that the lands embraced within said treaty (other than the common-hunting ground described therein) were not "public lands" but were lands which the Indians were left free to occupy under treaty stipulations with the United States, and were excepted from the said Act of July 2, 1864 under the provisions of section 3 thereof.

XIII.

The plaintiff excepts to the conclusion of the Master (page 171 of his report) that defendants' demurrer to Subdivision XXIX of the bill of complaint should be sustained.

XIV.

The plaintiff excepts to the conclusion of the Master (page 171 of his report) that defendants' plea of estoppel directed to Subdivision XXIX of the bill of complaint should be sustained.

XV.

The plaintiff excepts to the conclusion of the Master (page 180 of his report) that defendants' motion to dismiss Subdivision XXXII of the bill of complaint should be sustained. [452]

XVI.

The plaintiff excepts to the conclusion of the Master (page 194 of his report) relating to Subdivision XIII of the bill of complaint, wherein he states that "the demurrers to this subdivision must be sustained."

XVII.

The plaintiff excepts to the conclusion of the Master (page 194 of his report) as to the validity of mortgages executed following the 1875 foreclosure proceeding "that the United States has recognized them and acquiesced in and waived any possible want of power to their execution in the same manner and to the same extent as it has the foreclosure proceedings," whereas the Master should have concluded that the United States has not recognized said mortgages nor acquiesced in and waived want of power for their execution.

XVIII.

The plaintiff excepts to the conclusion of the Master (page 200 of his report) relating to Subdivision XVIII of the bill of complaint wherein he states that "the demurrer to this subdivision should be sustained."

XIX.

The plaintiff excepts to the conclusion of the Master (page 203 of his report) that defendants' plea of estoppel directed to Subdivision XVIII of the bill of complaint should be sustained.

XX.

The plaintiff excepts to the conclusion of the Master (page 207 of his report), relative to the subject-matter of Subdivision XXXVIII of the bill of complaint, "that the plea of waiver and acquiescence against forfeiture should be sustained." [453]

XXI.

The plaintiff excepts to the conclusion of the Master (page 209 of his report) relating to Subdivision XIV of the bill of complaint wherein he states "I must sustain the demurrer to this subdivision."

XXII.

The plaintiff excepts to the conclusion of the Master (page 211 of his report) that defendants' demurrer to Subdivision XXXIII of the bill of complaint should be sustained.

XXII-A.

See stipulation filed 1/11/34.

PLEA OF INNOCENT PURCHASER BY BANKERS TRUST COMPANY AND CITY BANK FARMERS TRUST COMPANY.

XXIII.

The plaintiff excepts to the conclusion of the Master (page 214 of his report) that as to all place lands patented or certified for patent prior to the date of the mortgages, the holders of outstanding bonds under said mortgages are innocent purchasers.

XXIV.

The plaintiff excepts to that portion of the Master's conclusion (set forth in the first paragraph on page 215 of his report) which reads as follows: "Third: So, likewise, are the bond holders innocent purchasers of all indemnity selections made and approved prior to the date of the mortgage, except such selections in lieu of place lands that did not, and as matter of law could not, pass under the grant," but plaintiff does not except to that portion of the Master's statement by which he impliedly concludes that the bondholders are not innocent purchasers of lands obtained as selections in lieu of place lands that did not, and as matter [454] of law could not, pass under the grant, nor does plaintiff except to the last sentence in the paragraph reading as follows: "The indemnity selections allowed for claimed losses within the place limits where the railroad parallels the line of the Portage, Winnebago & Lake Superior Railroad Company are within this exception." The Master should have concluded that the bondholders are not innocent purchasers of any indemnity lands or any claims for indemnity lands which have been or might be obtained under the Act of July 2, 1864 or the Resolution of May 31, 1870.

XXV.

The plaintiff excepts to the conclusion of the Master (page 215 of his report) that the bond-

holders are innocent purchasers of all place lands actually earned by the Railroad Company and which passed under the terms of the grant even though not at the date of the execution and sale actually patented or certified, and plaintiff further excepts to the conclusion of the Master wherein he states "If by fraud of the railway company the classification was, in whole or in part, wrong, the trust companies are not affected thereby." The Master should have concluded that the bondholders are not innocent purchasers of any place lands granted under the provisions of the Act of July 2, 1864, or the Resolution of May 31, 1870.

GEORGE C. SWEENEY
Assistant Attorney General
ROY C. FOX
United States Attorney for the Eastern District of Washington.
D. F. McGOWAN
Special Assistant to the Attorney General.
E. E. DANLY
Special Assistant to the Attorney General.

[Endorsed]: Filed July 8, 1933. [455]

[Title of District Court and Cause.]

ORDER

It Is Hereby Ordered that Frank H. Graves, Esquire, who was on the 25th day of February, 1932, appointed Special Master in this Court by order made and filed on said day, be allowed the sum of Twenty-five Thousand Dollars ($25,000.00) as compensation for his services to date, and that pursuant to the terms of said order of February 25, 1932, the amount of compensation herein fixed shall be borne equally and paid, one half each, by the plaintiff and the defendant, Northern Pacific Railway Company.

Done in open Court this 25th day of January, 1934.

J. STANLEY WEBSTER
District Judge.

[Endorsed]: Filed Jan. 25, 1934. [456]

[Title of District Court and Cause.]

Homer Cummings, Attorney General, Harry W. Blair, Assistant Attorney General, E. E. Danly, Special Assistant to the Attorney General, J. Crawford Biggs, Special Assistant to the Attorney General, J. M. Simpson, United States Attorney, Counsel for United States of America.

D. F. Lyons, D. R. Frost, Grafton Mason, F. J. McKevitt, Counsel for Northern Pacific Railway Company, Northern Pacific Railroad Com-

pany, and Northwestern Improvement Company.

Taylor, Blanc, Capron and Marsh, F. J. McKevitt, Mansfield Terry, Edward C. Watts, Jr., Henry R. Labouisse, Counsel for City Bank Farmers Trust Company.

White and Case, F. J. McKevitt, J. Du Pratt White, G. L. Vaught, Jr., Alfred N. Hueston, Counsel for Bankers Trust Company.

MEMORANDUM

Plaintiff's bill in equity in this case was filed pursuant to the provisions of the Act of June 25, 1929 (46 Stat. 41). Upon the filing of the defendants' answers the defendants moved that there be taken up in advance of trial under Equity Rule XXIX certain defenses pleaded in the answers. This rule provides that "Every defense heretofore presentable by plea in bar or abatement shall be made in the answer and may be separately heard and disposed of before the trial of the principal case in the discretion of the Court". The motion was granted and on February 25, 1932, Frank H. Graves, Esquire, was appointed special master in chancery and these [457] defenses were referred to him for consideration and report. After taking testimony pertinent to the defenses referred to him the special master fixed May 10, 1932, as the time for oral argument. Counsel for both sides of the

controversy appeared at the time appointed and the arguments covered the period from May 10, 1932, to May 25, 1932. The report of the special master was filed on May 31, 1933. Thereafter exceptions to the report were duly filed by the parties respectively, the plaintiff filing twenty-five exceptions and the defendants filing fourteen. These exceptions challenge practically all of the conclusions and recommendations of the special master. Thereafter the Court fixed January 9, 1934, as the time for hearing argument on the exceptions and these arguments covered, without interruption, the period from January 9, 1934, to and including January 24, 1934. At the conclusion of the oral arguments time was allowed for the filing of briefs and in due course voluminous, exhaustive and extraordinarily able briefs were filed. The case is now under submission on the exceptions to the report of the special master.

Equity Rule 61½, promulgated May 31, 1932, provides in part that "the report of the master shall be treated as presumptively correct, but shall be subject to review by the Court, and the Court may adopt the same, or may modify or reject the same in whole or in part when the Court in the exercise of its judgment is fully satisfied that error has been committed".

After careful and painstaking consideration and study of the oral arguments and elaborate briefs and an examination of the controlling authorities, and after repeated and critical perusals of the special master's report, I am not only not "fully

satisfied" that error has been committed by the special master but on the contrary I am "fully satisfied" that his conclusions are sound and correct. His report is painstaking, exhaustive and masterful, and the more I have examined and analyzed it in the light of the vigorous criticisms of it, made in oral arguments and written brief, the more I am convinced that his views and conclusions are sound and are amply sustained in reason, principle and authority.

Whilst in some instances additional reasons might be advanced in support of the conclusions reached, and in others different reasons may suggest themselves, [458] in every instance I find myself in complete accord with the result arrived at. If the learned special master and I were sharing a joint and equal responsibility as members of a court in deciding the questions involved, and he had submitted his report in the form of a proposed opinion, I should not hesitate fully to concur in it. In such circumstances it would serve no useful purpose but would be a labor of supererogation on my part to undertake any extensive elaboration of the master's report.

On the important question of the proper application of the equitable maxim or doctrine of "He who comes into equity must come with clean hands" I wish to call attention to the case of Manufacturers Finance Company vs. McKey, Trustee in Bankruptcy, 294 U. S. 442, decided by the Supreme Court on March 4, 1935, and long after the special master

had filed his report. It seems to me that this case lends strong support to the views of the special master as to the application of the "clean hands" doctrine to the facts of the case in hand.

With respect to Subdivision XXXVIII of the bill, alleging the fraudulent classification of lands under the Mineral Classification Act of February 26, 1895 (28 Stat. 683), I feel a word should be added. In view of the tentative and qualified conclusions of the special master on this aspect of the case (see special master's report, page 146) I attempted during the course of the oral arguments before the Court to have counsel for the government define a trifle more specifically the purpose of these allegations and just what place they were intended to occupy or what office they were intended to perform in the theory of the government's case. The result was that counsel for the government (Mr. McGowan) by repeated and definite oral statements asserted that no money judgment was sought by the government in the way of damages for the alleged fraudulent classification, nor did the government ask any reclassification of the lands; that the sole purpose of the allegations in this regard was to give rise to the application of the "clean hands" doctrine. No motion for leave to amend the bill in accordance with the special master's suggestion has been made. The sole point, therefore, in this aspect of the case is whether these allegations are sufficient to call for the application of the [459] "clean hands" maxim. Since I fully concur in the special

master's opinion that the allegations do not give rise to the "clean hands" doctrine the demurrer or motion directed to the portion of the bill now under consideration should be sustained and this matter should be stricken from the bill.

I feel that a few brief observations are in order concerning Subdivision XXIX of the bill relating to the Fort Laramie Treaty of September 17, 1851, and the Blackfoot Treaty of October 17, 1855—this because of the recent decisions of the Court of Claims in the Fort Berthold case, decided December 1, 1930, and the Blackfoot case decided April 10, 1933, and the kindred cases decided by that court dealing with the same or similar questions. None of these cases either held or intimated that the lands covered by the treaties in question were reserved lands within the meaning of Section 3 of the Act of July 2, 1864. Under the broad jurisdictional acts, pursuant to which these cases were instituted, it was not necessary to recovery by the Indians that the land be held to constitute a technical reservation under the treaties and we must not be misled by the broad language employed in the opinions of the Court. These treaties may well give rise to substantial recovery by the Indians without at all implying that the lands assigned to the various tribes under the provisions of the treaties were removed from the operation of the original land grant to the railway company.

To illustrate how ridiculous it would be to hold that these treaties exempted the lands covered by them from the grant to the railway company let us

note briefly the situation as to the Crow Territory alone. Under the Fort Laramie Treaty the acreage in the Crow Territory was 37,500,000 acres and there were approximately 3000 Crow Indians in 1851. This means that 12,500 acres or more than eighteen square miles, were "reserved" for each man, woman and child in the Crow tribe. If there had been a reservation of these lands so that they did not pass under the grant of 1864, the railway company would have been compelled to build more than 700 miles of railroad without the aid of the grant except to the limited and comparatively inconsequential extent that it might be able to secure indemnity. Since the purpose of the Act of 1864 was to aid and encourage the construction of a transcontinental railroad from Lake Superior to Puget Sound it would hardly do to hold that [460] Congress in that very act so contrived as to make the construction of such a railroad impossible. It requires no argument to demonstrate that if these lands had been reserved the road could not have been constructed. I am convinced that it was never the thought or purpose of the Congress that the lands involved in these treaties were to be excepted from the grant to the railway company, no matter what effect that may have had in conferring some rights upon the tribes involved.

My conclusion is that all exceptions filed, both by plaintiff and defendants, be overruled and that the report of the special master in its entirety be adopted. Order accordingly will be entered in due course.

[Endorsed]: Filed Sept. 9, 1935. [461]

[Title of District Court and Cause.]

ORDER

This cause came on to be heard upon the report of the Special Master, filed herein on the 31st day of May, 1933, and the exceptions of the various parties thereto; and the Court having heard argument and being fully advised in the premises, it is now ordered, adjudged and decreed as follows, viz:

1. All the exceptions of plaintiff and of defendants be and they hereby are overruled.

2. The report of said Special Master be and hereby is adopted in its entirety.

3. The replies of plaintiff to the answers and amended answers of defendants, Northern Pacific Railway Company and Northwestern Improvement Company, and the reply to the answer of the Northern Pacific Railroad Company, be and they hereby are stricken from the files of the Court.

4. The return of service of summons upon Edward A. Gay, as an officer of Northern Pacific Railroad Company as reorganized in 1875, be and the same hereby is quashed. [462]

5. The following subdivisions and portions of subdivisions of the complaint be and they hereby are dismissed from said complaint: Subdivisions VI, VII, VIII, all of IX except the first two paragraphs thereof, all of X except the third paragraph thereof, XI, XII, XIII, XIV, XV, XVIII, XIX, XXVI, XXVII (granted on application of plaintiff), XXVIII, XXIX, XXX, XXXI, XXXII, XXXIII, XXXV, XXXVI, and XXXVIII.

It is further ordered and decreed that the Special Master proceed with the final hearing as provided in the order of appointment entered herein February 25, 1932.

Dated 3rd Oct. 1935.

J. STANLEY WEBSTER
District Judge.

O. K. as to form.
J. M. SIMPSON
U. S. Atty.
D. F. LYONS
Sol. for Defendants
Nor. Pac. Ry. Co. Nor. Pac. Rd. Co. and Northwestern Improvement Company.

[Endorsed]: Filed Oct. 3, 1935. [463]

[Title of District Court and Cause.]

ORDER

On motion of the defendants, Bankers Trust Company, a corporation, and City Bank Farmers Trust Company, a corporation, heretofore filed in this Court and heard before me the 13th day of January, 1936; plaintiff appearing by one of its solicitors, J. M. Simpson, United States District Attorney for the Eastern District of Washington; the defendants, Northern Pacific Railway Company, a corporation, Northern Pacific Railroad Company, a corporation, Northwestern Improvement Company, a corporation, Bankers Trust Com-

pany, a corporation, and City Bank Farmers Trust Company, a corporation, appearing by one of their solicitors, F. J. McKevitt; the Court having heard the argument and being fully advised in the premises, it is now

Ordered, Adjudged and Decreed that that certain order heretofore entered in the above entitled Court on the 3rd day of October, 1935, be and the same is hereby amended to read as follows:

"This cause came on to be heard upon the report of the Special Master, filed herein on the 31st day of May, 1933, and the [464] exceptions of the various parties thereto; and the Court having heard argument and being fully advised in the premises, it is now ordered, adjudged and decreed as follows, viz:

"1. All the exceptions of plaintiff and of defendants be and they hereby are overruled, except that there are reserved until the final hearing all questions with respect to the defenses of innocent purchasers for value interposed by the defendants Bankers Trust Company, as Trustee, and City Bank Farmers Trust Company, as Trustee.

"2. The report of said Special Master be and hereby is adopted in its entirety, except for the matters reserved as just provided.

"3. The replies of plaintiff to the answers and amended answers of defendants, Northern Pacific Railway Company and Northwestern Improvement Company, and the reply to the answer of the Northern Pacific Railroad Company, be and they hereby are stricken from the files of the Court.

"4. The return of service of summons upon Edward A. Gay, as an officer of Northern Pacific Railroad Company as reorganized in 1875, be and the same hereby is quashed.

"5. The following subdivisions and portions of subdivisions of the complaint be and they hereby are dismissed from said complaint: Subdivisions VI, VII, VIII, all of IX except the first two paragraphs thereof, all of X except the third paragraph thereof, XI, XII, XIII, XIV, XV, XVIII, XIX, XXVI, XXVII (granted on application of plaintiff), XXVIII, XXIX, XXX, XXXI, XXXII, XXXIII, XXXV, XXXVI, and XXXVIII. [465]

"It is further ordered and decreed that the Special Master proceed with the final hearing as provided in the order of appointment entered herein February 25, 1932."

Done in open Court this 29th day of January, 1936.

J. STANLEY WEBSTER
District Judge.

O. K. as to Form:
J. M. SIMPSON
United States Attorney.
F. J. McKEVITTE
Solicitor for Northern Pacific Railway Co., Northern Pacific Railroad Co., Northwestern Improvement Co., Bankers Trust Co. and City Bank Farmers Trust Co.

[Endorsed]: Filed Jan. 29, 1936. [466]

[Title of District Court and Cause.]

ORDER

On motion of the plaintiff filed in this Court, plaintiff appearing by two of its solicitors, J. M. Simpson, United States District Attorney for the Eastern District of Washington, and E. E. Danly; the defendants, Northern Pacific Railway Company, a corporation, Northern Pacific Railroad Company, a corporation, and Northwestern Improvement Company, a corporation, appearing by one of their solicitors, D. R. Frost; Bankers Trust Company, a corporation, and City Bank Farmers Trust Company, a corporation, appearing by one of their Solicitors, F. J. McKevitt; the Court having heard argument on the motion on this 21st day of April, 1936 by consent of all parties, and no objection being made by any of the parties to the granting of the motion and the Court being fully advised in the premises, it is now

Ordered, Adjudged and Decreed that that certain order of reference heretofore entered in the above entitled cause on February 25, 1932, ratified by the order of this Court entered on October 3, 1935 (as amended by an order entered on January 29, 1936) be and the same is hereby amended as follows:

[467]

That the Special Master proceed with the hearing of said cause and take evidence relative to all matters therein not covered by the Special Master's Report filed herein May 31, 1933, except evidence relative to the values of lands in controversy and the

amount of compensation due plaintiff or any of the defendants, hear argument of counsel thereon, and report to this Court his findings of fact and conclusions of law and the evidence taken, together with recommendations for an order or decree thereon, said findings and conclusions to be subject to review by this Court.

After the findings and conclusions and recommendations have been reported to this Court and any exceptions thereto have been heard and determined and an order or decree thereon has been entered, in event no appeal from any order or decree in this cause shall be taken within 60 days thereafter, said Special Master shall proceed with the final hearing of said cause and make full and complete findings of fact and conclusions of law and report the same to this Court together with the evidence taken, said findings and conclusions to be subject to review by this Court.

Done in open court this 21st day of April, 1936.

J. STANLEY WEBSTER
United States District Judge

Form approved:
D. R. FROST
F. J. McKEVITT
E. E. DANLY

[Endorsed]: Filed Apr. 21, 1936. [468]

[Title of District Court and Cause.]

To the Clerk of the Above Entitled Court:

You will please enter my appearance as Solicitor for Northern Pacific Railway Company, Northwestern Improvement Company, and Northern Pacific Railroad Company, defendants in the above entitled cause, and service of all subsequent papers, except writs and process, may be made upon said Northern Pacific Railway Company, Northwestern Improvement Company, and Northern Pacific Railroad Company, defendants, by leaving the same with

L. B. daPONTE

Office Address
Northern Pacific Building,
St. Paul, Minnesota.

[Endorsed]: Filed July 22, 1937. [469]

[Title of District Court and Cause.]

REPORT ON ADJUSTMENT

Sir:

I have the honor to transmit herewith my report on the adjustment of the Northern Pacific Railroad grants under the amended Order of reference of April 21, 1936, together with the testimony and exhibits.

I hope that Your Honor and counsel will find the

several subjects adequately treated in what I have written.

Respectfully submitted,
F. H. GRAVES,
Special Master.

July 23, 1937.

THE HONORABLE J. STANLEY WEBSTER,
Judge of the District Court of the United States for the Eastern District of Washington.

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Preliminary Matters.

The Two Grants.

The grant of land under the Act of July 2, 1864, 13 Stat. 365, Sec. 3, in aid of the road from Lake Superior to Puget Sound, is in these words:

> "Sec. 3. And be it further enacted, That there be, and hereby is, granted to the 'Northern Pacific Railroad Company,' its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold,

reserved, occupied by homestead settlers, or preempted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections: Provided, That if said route shall be found upon the line of any other railroad route to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: . . . Provided, further, That all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd-numbered sections, nearest to the line of said road, and within fifty miles thereof, may be selected as above provided: And provided, further, That the word 'mineral', when it occurs in this act, shall not be held to include iron or coal. . . ."

The Joint Resolution of May 31, 1870, 16 Stat. 378, adopts the grant of 1864, and applies it to the line from Tacoma to Portland. It provides further as follows: [472]

"and in the event of there not being in any State or Territory in which said main line or

branch may be located, at the time of the final location thereof, the amount of lands per mile granted by Congress to said company, within the limits prescribed by its charter, then said company shall be entitled, under the directions of the Secretary of the Interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, in such State or Territory, within ten miles on each side of said road, beyond the limits prescribed in said charter, as will make up such deficiency, on said main line or branch, except mineral and other lands as excepted in the charter of said company of eighteen hundred and sixty-four, to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of subsequent to the passage of the act of July two, eighteen hundred and sixty-four."

The two enactments will be referred to frequently as the "Act" and the "resolution", respectively.

Terminology.

In the administration of railroad grants a certain terminology has grown up in the Land Office. That terminology may as well be stated and examined here as elsewhere, because it is used in the testimony and exhibits in the case, and in the argument of counsel before me, and will be employed in this report. The irregular quadrilateral formed by the terminal limits at Ashland and Pasco under the

grant of 1864 for the main line and at Pasco and Tacoma for the branch line over the Cascades; and by the lateral limits of 40 miles on either side of the road through Territories and 20 through States; and the like quadrilateral formed by the grant contained in the resolution of 1870, between Portland and Tacoma, are termed the place limits, sometimes the primary limits, and the lands comprehended within these limits are termed the place lands, sometimes the primary lands.

Lands lying within the place or primary limits, but "granted, sold, reserved, occupied by homestead settlers, or preempted or otherwise disposed of" prior to the time the line of the [473] road opposite to which such lands lay was definitely fixed, are said to have been "lost" to the grant. In lieu of the lands so lost, the company was entitled to select other lands in odd-numbered sections within the distances specified by the act and resolution, known as the indemnity limits or indemnity belts.

The 10-mile strip provided by the act, in which selection for losses might be made, is termed the first indemnity belt. The 10-mile additional strips authorized to be laid down under certain restrictions where necessary by the resolution, and which were laid down in the states and in certain territories, are called the second indemnity belt. By the act the company might indemnify itself for mineral losses out of any odd-numbered sections lying within 50 miles of the road on either side. This is called the mineral indemnity belt. Certain peculiarities of this

belt should be noted. Because of the restriction to 50 miles, the exterior limit of this belt through territories is co-terminous with the exterior lines of the first indemnity belt, and it follows, hence, that no mineral selections could be made in the second indemnity belt in those portions of the line. In the states, however, the exterior line of the mineral belt fell 10 miles beyond the limit of the second indemnity. On its face, it covered the place as well as the first indemnity in the territories and the extended limits in the states, with the result that selections for mineral losses might be made in the place limits. The Land Department has permitted such selections in certain cases under an opinion of Attorney-General Wickersham, of date July 24, 1912, reported in 41 L. D. 571. Whether this ruling of the Attorney-General and the consequent practice of the Land Office was correct is one of the questions in this case. It, of course, can have applica- [474] tion only to cases where lands in the place limits had been reserved by the government for some purpose, or occupied by settlers under the land laws of the United States, at the date of definite location, with the consequence that such lands did not pass under the grant, and thereafter were restored to the public domain for whatever reason. In many instances the company has claimed, and has been allowed, the right to make selections for mineral losses from such restored lands.

Prior losses mean losses which occurred in the place limits prior to the date of the act. Subsequent

losses mean those occurring between the date of the act and the date of definite location of a given section of the road. Both prior and subsequent losses might be satisfied in the first indemnity belt anywhere along the line without reference to the state or territory in which they had occurred.

N. P. exhibit 131, a map of the route of the road from Ashland on Lake Superior to Tacoma, and from Tacoma to Portland, and of the land grant limits pertaining thereto, illustrates the grants conferred by the act and the resolution. The yellow strip represents the belt 40 miles in width on each side of the road through the territories and 20 miles on each side through the states, constituting the primary or place limits. The pink strip on each side represents the first indemnity belt created by the act. The green strips represent the second indemnity belt created by the resolution. The brown strips in the states represent the additional limits not more than fifty miles from the road within which selections might be made in lieu of mineral losses. The red areas within the place limits represent tracts originally lost to the grant, and afterward restored to the public domain. No [475] second indemnity limits exist in North Dakota because at the date of final location in that territory there was no deficiency, that is, the lands available in the first indemnity limits exceeded the losses in the place limits. The same condition existed in Washington as to the grant by the act of 1864, that is, the grant in aid of the construction from the east to

Pasco and thence to Tacoma. Whether second indemnity limits, though shown on the exhibit for the grant in Washington by the resolution, that is, the grant in aid of the construction from Kalama, north of Portland, to Tacoma, were authorized, is a point in issue hereafter to be discussed. Place limits and first indemnity limits appurtenant to construction in Washington under the act extend into Oregon, for those limits depend upon the location of the route of the road and extend for the prescribed distance laterally regardless of an intervening state or territorial boundary. The same condition as to first indemnity limits prevails in Wyoming with respect to construction in Montana, but the second indemnity limits resulting from the Montana deficiency do not extend into Wyoming because the resolution confines additional indemnity for any state or territory in which the grant is deficient to "such State or Territory". The second indemnity limits in Idaho to the north do not extend for the full 10 miles because intercepted by the international boundary.

The lateral lines of the several limits are shown in continuous straight or curved lines. In fact, as other exhibits disclose, the lateral lines are jagged, following sectional and subdivisional boundaries pursuant to a necessarily arbitrary rule of the General Land Office, about which there is no controversy. Arcs were described at specified intervals 20, 40, 50 or 60 miles from the line of road, as the case might be, tangents to such arcs [476] were

drawn, and the lateral lines were drawn through the tangents on sectional and sub-divisional lines in such a way as to balance the gains and losses. The terminal limits also were established by arbitrary rule. A line was drawn from some selected point on the road to the terminus and a perpendicular to that line, erected at the terminus, became the terminal limit. Such terminal limits may be seen at Ashland, Wisconsin, and at Pasco, Washington, for the grant by the act for the main line, at Pasco and Tacoma for the branch line, and at Portland and Tacoma for the grant by the resolution. The exhibit also indicates the dates of definite location of the several sections of the road under both grants, and the dates at which the several indemnity limits in each of the states and territories were laid down.

Prior to 1879 all railroads having land grants with indemnity rights were allowed to make indemnity selections in bulk, that is, without assigning a specific loss for each tract selected as indemnity. Thereafter, subject to exceptions, they were required to specify their losses and selections tract for tract. The history of Land Office practice in this respect is recounted in La Bar v. Northern Pacific, 17 L. D. 406. In the process of selecting indemnity the losses are sometimes called base, and the process itself is called assignment of losses or assignment of base. The lists of the losses are sometimes called base, and the process itself is called assignment of losses or assignment of base. The lists of the losses and of the indemnity lands selected are called selection lists, several of which are in evidence.

In this report all losses other than mineral will at times be referred to as general losses. A distinction is to be observed with respect to the character of lands which might be selected as indemnity for the two classes of losses. While mineral lands were excluded from the operations of the act, it was [477] provided that the word "mineral" should not be held to include iron or coal, and hence such lands could be selected in lieu of general losses. As, however, by the third proviso, selections for mineral losses were limited to agricultural lands, iron and coal could not be taken for mineral losses. This is obviously correct irrespective of the definition which shall ultimately be given to the phrase "agricultural lands" as used in that proviso.

Occasionally lands not reserved, sold, granted, or otherwise appropriated, and free from preemption or other claims or rights, have been referred to as "free" lands, and I shall in this report at times employ that term to save repetition and circumlocution. Of course, this term does not have any reference to mineral lands or mineral losses. These are in a class by themselves.

All free lands within the place limits and all lieu lands properly selected by the company within indemnity limits, are, in the process of adjustment, said to be charged to the grant.

Established Principles.

Under these grants certain principles are firmly established and are not in dispute. The grants of

land in place limits are in praesenti. I quote here for precision Mr. Justice Field's definition of what is meant by that phrase in St. Paul & Pacific Railroad Company v. Northern Pacific Railroad Company, 139 U. S. 1, 5:

> "As seen by the terms of the third section of the act, the grant is one in praesenti; that is, it purports to pass a present title to the lands designated by alternate sections, subject to such exceptions and reservations as may arise from sale, grant, preemption, or other disposition previous to the time the definite route of the road is fixed. The language of the statute is 'that there be, and hereby is, granted' to the company every alternate section of the lands designated, which implies that the property itself is passed, not any special or limited interest in it. The words also import a transfer [478] of a present title, not a promise to transfer one in the future.
>
> The route not being at the time determined, the grant was in the nature of a float, and the title did not attach to any specific sections until they were capable of identification; but, when once identified the title attached to them as of the date of the grant, except as to such sections as were specifically reserved. It is in this sense that the grant is termed one in praesenti; that is to say, it is of that character as to all lands within the terms of the grant, and not reserved

from it at the time of the definite location of the route.

This is the construction given to similar grants by this court, where the question has been often considered; indeed, it is so well settled as to be no longer open to discussion."

In that sense the lands in indemnity limits were not "granted". The grant was rather of a right or power. That right or power is protected, however, under the due process clause of the Constitution, as much as in the grant of the lands in place. No right to any specific tract of land vested in the railroad until it had been selected, and thereupon, when properly selected and allowed, the company became entitled to the selected lands by the same right and with the same vigor as it held the lands in place. Again for precision I quote the language of Mr. Justice Van Devanter in Payne v. Central Pacific Railway Company, 255 U. S. 228, 236:

> "The ultimate obligation of the Government in respect of the indemnity lands is on the same plane as that respecting the lands in place. The only difference is in the mode of identification. Those in place are identified by filing the map of definite location, and the indemnity lands by selections made in lieu of losses in the place limits."

It may be added here, too, that until the time of such selection, all lands in indemnity belts were open to settlement under the land laws of the

United States, and thus might be lost to the right of selection by the railroad company. Hewitt v. Schultz, 180 U. S. 139. [479]

The duties of the Secretary of the Interior with respect to the provision of the act authorizing the company to select indemnity under his "direction" are comprehensively stated by Mr. Justice Van Devanter in Payne v. Central Pacific Railway Company following the quotation just given above:

> "The selections are to be made by the grantee, not by the Secretary of the Interior. True, the act provides that they shall be made under the Secretary's direction, but this merely applies to them the general rule, announced in Rev. Stats., 441, 453, 2478, that the administrative execution of all public land laws is to be under his 'supervision' and 'direction.'" Catholic Bishop of Nesqually v. Gibbon, 158 U. S. 155, 166. Its purpose is to make sure that, in accord with that power of supervision and direction, he is to see to it that the right of selection is not abused, that claims arising out of prior settlement and the like are not disturbed, that no indemnity is given except for actual losses of the class intended, and that the lands selected are such as are subject to selection. But of course it does not clothe him with any discretion to enlarge or curtail the rights of the grantee, nor to substitute his judgment for the will of Congress as manifested in the granting act."

Obviously the Secretary's duty may be, and ordinarily must be, exercised by general regulations, but it should be borne in mind that these regulations cannot have the effect of curtailing or enlarging the rights of the company as granted by the act and resolution. I make this observation because in the testimony and in some of the Land Office decisions there is a tendency to exalt the regulations and to assign reasons of convenience for their application wholly beyond the purpose for which they are made.

Some Preliminary Rulings.

Certain questions in connection with the indemnity belts that will arise at various places in this report have not been settled, and I think it will be more convenient to state and determine them here than elsewhere. The United States says, and [480] the Land Department has held, that only subsequent losses can be indemnified in second indemnity limits. I do not think this is sound. The language of the resolution authorizing second indemnity limits uses the term "subsequent to the passage of the act" only as a measure of the quantity of losses that may be satisfied in second indemnity, not as a definition of the character of those losses. So long as the selections made in second indemnity do not exceed the subsequent losses, both prior and subsequent losses may be satisfied in second indemnity. This seems to me plain.

On the other hand, the company insists, or, perhaps it were better to say, suggests, that no warrant is to be found in the terms of the resolution, limiting the selection in second indemnity to losses arising in the state or territory to which the limits appertain. I hold that the phraseology employed, and the spirit of the provisions of the resolution authorizing a second indemnity belt, have the effect of restricting the losses to be there satisfied to those originating in the same state or territory. I do not think that I am called upon to enlarge upon this ruling or to further explain my meaning, because the company makes no argument upon the point, but only a suggestion as indicated above. Probably it makes no difference in the result.

While title to the lands in the place limits vested immediately upon filing of the map of definite location whether the lands had been surveyed or not, title to land in the indemnity limits did not attach until the lands had actually been selected, and under the rulings of the Land Office such selections could not be made prior to survey. Several successive statutes provided for the survey of public lands in the states and territories through which the road ran, but the progress of the surveys did [481] not by any means keep up with the construction of the road, nor proceed fast enough to enable the company to make rapid selections. The government has suggested at various places in its testimony that these delays were, in part at least, due to the fault of the company in failing to make deposits or pay-

ments as required by the various statutes. In argument before me, however this point is not urged, and I do not know whether it is intended to be waived. In any event, I am convinced by the testimony that the company acted in respect of these surveys with reasonable diligence. It is probable that in some cases it might have proceeded a little more promptly, but the successive statutes were more or less difficult of application, and I think, all things considered, that the company did the best it could under the conditions. Mr. Frost, in argument to me, said that, notwithstanding certain allegations in its pleadings, and certain suggestions made in the taking of testimony, it did not criticize the government in respect of these surveys, and that he presumed it proceeded as fast as could reasonably be expected under the circumstances. I think the evidence fully justifies that concession. I should so hold even if it were not conceded.

"The Forest Reserve Case".

By the Act of March 3, 1891, 26 Stat. 1103, the United States initiated the policy of setting apart public lands in national forests. From that act is derived the first paragraph of U. S. C. A., Title 16, Sec. 471, relating to the establishment and administration of national forests, as follows:

> "The President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, (in) any part of the public lands wholly

> or in part covered with timber or undergrowth, whether of commercial value or not, as national forests, and the President shall, by public proclamation, declare the establishment of such forests and the limits thereof." [482]

In 1892 5,120 acres of odd-numbered sections with the second indemnity limits of the Northern Pacific grant in Montana were withdrawn pursuant to that statute. More extensive withdrawals were made in 1898. Withdrawals for national forests and other purposes continued to be made, so that up to the present time 3,369,627.95 acres of odd-numbered sections within the indemnity limits of the grant of 1864, and 368,729.50 acres of odd-numbered sections within the indemnity limits of the grant of 1870 have been included in the withdrawals for forest reserves and other governmental purposes. The validity of such withdrawals of indemnity lands pervades the entire case, for of the specific lands that are possibly available to meet the deficiencies in the grants, and for which in this proceeding the company seeks compensation, only about 700 acres within the grant of 1864, and about 2,000 acres, as computed by the company, or 7,000 acres, as computed by the government, within the grant of 1870, lie outside the lands so withdrawn. Govt. exhibit 88 is a map showing the lands withdrawn for national forests and for the Tongue River-Northern Cheyenne Indian Reservation.

On several occasions subsequent to 1898 the company had filed selection lists for the purpose of ob-

taining indemnity lands within the withdrawn areas in lieu of place losses, but the Land Office had rejected or withheld such selections because of the withdrawals. In 1905 such a list of mineral losses, aggregating 5,681.76 acres, was filed for the selection of lands in the first indemnity limits in Montana within an area temporarily withdrawn under executive order, and afterward included in the Gallatin National Forest. Through inadvertence the local land office approved the list, and the lands were patented to the com- [483] pany. Later, on discovery of the fact, the United States instituted a suit for the cancellation of the patent. The case reached the Supreme Court of the United States, and is the often-referred-to Forest Reserve case, United States v. Northern Pacific Railway Company, 256 U. S. 51.

By the act of March 3, 1887, Congress had directed the Secretary of the Interior to immediately adjust all railroad land grants in accordance with the decisions of the Supreme Court. On March 26, 1906, the Commissioner of the General Land Office addressed a letter to the Secretary of the Interior transmitting a statement of the Northern Pacific grants, known as the Jones adjustment. That report showed a deficiency in the 1864 grant of 3,666,451.74 acres, and in the 1870 grant of 532,029.73 acres. Without undertaking here to finally interpret the Forest Reserve case, the Supreme Court there said that whether the withdrawal of the lands then in controversy was valid, depended upon whether the grant of 1864 was deficient at the time of the tempo-

rary withdrawal, that is, whether, aside from the withdrawn lands, sufficient lands remained, or remained and were available, to satisfy the remaining losses. Counsel in that case had stipulated that the deficiency shown by the Jones adjustment existed, but since it did not appear that that report or adjustment had been called to the attention of the Secretary of the Interior, who alone by the Act of 1887 was authorized to adjust the grant, it was not accepted by the Court as authoritative, and the case was remanded in order to permit the parties to supplement the record by a proper showing as to whether sufficient lands remained outside the withdrawn lands to satisfy the determined deficiency. [484]

In my former report, pp. 13-14, I related briefly the proceedings following the Forest Reserve case and leading up to the passage of the act of June 25, 1929, under which this suit was brought. At pp. 20-23 I stated the substance of the several provisions of that act. I think it will not be necessary to restate any of those things here.

The Pleadings.

At pp. 23-25 of my former report I undertook, in general terms, to define the pleadings and to classify the several paragraphs of the bill. That was done, however, with reference to the matters covered by that report, and I think it may be well to make a brief statement of the pleadings so far as concerns the matters here to be considered. Certain of the allegations of the bill, such as those pertaining to

failure to subscribe for the requisite amount of stock, the reorganization of 1875, the reorganization of 1896, the circuitous route through Washington, the claim of forfeiture for failure to comply with the condition subsequent requiring the company to construct the road on time, and perhaps some others of the same sort, have all been disposed of. Most of those related to such fundamental defects as were supposed to defeat the grant in whole or in part, and so were properly and necessarily pleaded.

Certain other allegations related to the admeasurement of the grants such, for instance, as the conflict with the Portage, Winnebago, and Superior Railroad, the lateral errors in Montana and Idaho, and the terminal errors at Ainsworth and Portland. All these latter allegations and others of the same nature, I assumed in that report, were necessary to be pleaded as going to the adjustment of the grant. No suggestion was made by counsel [485] in argument before me, nor do I think before Your Honor, upon this point, and it was not material whether they were necessarily pleaded, nor what was a proper pleading. I took the allegations in the bill and answer as they were on that subject, and I believe that Your Honor so accepted the pleadings, neither counsel contending anything about it.

Now, however, we are confronted with a situation requiring a determination of what pleadings are necessary for the purpose of the adjustment, which is the matter now under consideration. Again, in

the recent argument before me, no suggestion was made by counsel on either side, upon the subject, and no authorities were cited. Nevertheless, it must be determined preliminarily because many of the important questions presented upon the adjustment are not mentioned in the pleadings in any way; for instance, on the part of the United States, the question whether, under the resolution, lateral limits on the Tacoma-Portland line were authorized, and the question of what is "agricultural land" within the meaning of that term as used in the provision for indemnity for mineral losses; and, on the part of the company, the request for reassignment of base. The subject of the Tacoma Overlap is likewise not pleaded.

I am now convinced that no pleading upon the subject of the adjustment is necessary, nor, I think, is proper, except an allegation that the grants are unadjusted and that the act under which the suit is brought requires this court to adjust them; and I think that in that adjustment, quoting from page 22 of my former report, "every question from the organization of the company to the date of the Act that had been, or that now might be, raised, should be presented to the Court and finally determined." [486]

By such a pleading the whole subject of adjustment, as distinguished from such fundamental questions as were supposed to defeat the grants, would have been brought into the case. Whatever else adjustment may mean, an adjustment as re-

quired by the act of June 25, 1929, means that every question affecting the administration of the grants from the beginning of that administration to the date of the act should be brought under review, and should be determined by the court, even though in so doing it might become necessary to modify, overrule or disapprove the doctrines, practice, and orders, made from time to time by the General Land Office in the administration of the grants.

The title of the Act of June 25, 1929, speaks of an "adjustment". It is as follows:

> "An Act To alter and amend an Act entitled 'An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific Coast, by the Northern route,' approved July 2, 1864, and to alter and amend a joint resolution entitled 'Joint resolution authorizing the Northern Pacific Railroad Company to issue its bonds for the construction of its road and to secure the same by mortgage, and for other purposes,' approved May 31, 1870; to declare forfeited to the United States certain claimed rights asserted by the Northern Pacific Railroad Company, or the Northern Pacific Railway Company; to direct the institution and prosecution of proceedings looking to the adjustment of the grant, and for other purposes."

In the fifth section the Attorney-General was authorized and directed to institute and prosecute such suit or suits as might, in his judgment, be required

to remove the cloud cast upon the title to lands belonging to the United States as a result of the claim of the company, and to have all controversies and disputes mentioned in the act respecting the operation and effect of the grants judicially determined and a full "accounting" had. In the prayer of the bill in this case the phrase [487] "an adjustment and accounting" is employed. I take it that all of these terms mean practically the same thing. I do not mean that this adjustment is an accounting, as that term is generally used. I mean only to say that in my view the proceedings in the adjustment of these grants are analogous to an accounting, and that the same principles of pleading are to be applied as are applied in accounting cases in equity, and to certain other classes of equitable suits discussed in the cases hereafter cited.

A bill for an accounting pleads the occasion and necessity for the accounting, but does not set forth the items of the account. This I think is fundamental. In 1 C. J. S. 669, under the head of equitable accounting, it is said:

> "Facts showing the right to an accounting must be specifically alleged if known to plaintiff, but the items of account need not be alleged, . . ."

An exception exists in the case of a suit against one for whom plaintiff is acting in a fiduciary capacity, where plaintiff should present his account with his bill.

In Calbeck v. Herrington (Ga. 1930) 152 S. E. 53, 56, it is said:

> "In an equitable proceeding to obtain an accounting, the plaintiff is not obliged to set out an itemized statement showing the amounts claimed, or to aver how much is due by the defendant upon an accounting; but all the petitioner in such a proceeding has to aver are facts sufficient to indicate that something will be found to be due to plaintiff by defendant."

The procedure indeed is implied in Equity Rule 63, requiring parties accounting before a master to bring in their respective accounts in the form of debtor and creditor. The parties here by their exhibits have, substantially, done this.

Therefore I shall proceed in making this adjustment upon the proof as submitted, upon the principles of the law of the grant, [488] and upon the doctrines of equity, in determining the final result. I should add that while the United States objected to the offer of evidence by the defendant touching the reassignment of base, and the Railway Company objected to the Government's evidence of error in the survey of the Montana place limits, for the reason in each case, that the matter was not pleaded, yet in argument and in the briefs filed before me neither makes any insistence upon the point.

Upon the question of the necessity of pleading specific items, my greatest concern arose with respect to the Government's objection to the defendant's evidence in support of its request for reassign-

ment of base. Doubt is removed, however, by reference to the principle which is evidently well settled, and which appears to me to be sound and satisfactory, that a party who demands an accounting submits himself to the result, and that no cross bill is necessary.

A general statement of the rule is found in 1 Am. Jur. 307:

> "It is well settled that a suit in equity for an accounting constitutes an exception to the general rule in equity that affirmative relief will not be granted to a defendant unless he makes claim to it by a cross bill or counterclaim; that a bill, in such a suit, imports an offer on the part of the complainant to pay any balance that may be found against him; that upon such an accounting both parties are actors, and either is entitled, according to the result, to the aid of the court to recover the balance that may be found in his favor; and that it is not necessary for the respondent to file any cross bill, or to set up matter in his answer in lieu of such cross bill. But the rule that the defendant in a suit for an accounting may obtain affirmative relief without filing a cross bill or counterclaim therefor does not apply where the relief granted is not within the scope of the complainant's bill."

A case frequently cited to this point is Goldthwaite v. Day, 149 Mass. 185, 21 N. E. 359, where the court, through Holmes, J., says, 21 N. E. 360:

"When a bill in equity is brought upon a mutual account, the cross-items in favor of the defendant are not matters of set-off. A set-off is a creation of statute. It is an independent claim which the statute allows the defendant to consolidate with the plaintiff's action by pleading it, if he chooses, subject to substantially the same defenses as if he had sued upon it separately. On the other hand, a mutual account exists by agreement, and the effect of it is that the cross-items extinguish each other pro tanto at once, as they accrue. The only claim of either party is to the balance. (citing cases) When a bill is brought upon such an account, it implies that there are items on both sides, and that the balance is uncertain until ascertained by aid of the court. It seeks to have the balance ascertained and paid, and as a condition of being entertained it imports an offer, which formerly it was required to express, on the part of the plaintiff, to pay the balance if it should turn out against him. (citing cases) Under such a bill the defendant has nothing to plead in order to get the advantage of it. His claim is not an independent one, but is admitted and asserted by the plaintiff, provided the items on his side exceed those on the plaintiff's side. Those items are not to be pleaded except when the defendant sets out the whole account in his answer."

That case is followed in Downes v. Worch (1906), 28 R. I. 99, 65 Atl. 603, which is annotated in 13

Am. & Eng. Ann. Cas., at page 648, the introductory paragraph of the note being as follows:

> "It is a well-settled rule in equity practice that a defendant will be granted affirmative relief only on cross-bill. 5 Encyc. of Pl. & Pr. 634. There are, however, several exceptions to this rule, and it has been generally held that a defendant in a suit in equity for an accounting may have affirmative relief without filing a cross-bill or counterclaim therein. This exception is as well settled and uniformly applied as the rule itself."

In McManus v. Sawyer, (D. C., S. D. N. Y., 1915) 231 Fed. 231, 238, Judge Learned Hand said:

> "Moreover, it is a well established rule that a party who demands an accounting submits himself to the result of the account if it goes against him. No cross-bill is necessary, and a decree may go for the balance either way."

The rule that in an accounting no cross-bill is necessary is doubtless an application of the general principle that he who seeks equity must do equity. In Farmers' Loan & Trust Co. [490] v. Denver L. & G. R. Co. (C. C. A., 8th Circ., 1903) 126 Fed. 46, a trustee under a railroad mortgage sought to foreclose upon after acquired property consisting of a shop tract in Denver, upon which Hutchison had a mortgage which was equitably prior. Hutchison was made a defendant and answered, but did not ask to foreclose. The court granted the complainant's

prayer for foreclosure, but conditioned the relief with a provision that out of the proceeds Hutchison should first be paid the amount in which his mortgage was equitably superior to that of complainant. The court said (p. 50):

> "They say that this condition could not be imposed and that the decree ought to be reversed, because Hutchison filed no cross-bill and prayed for no affirmative relief, while the decree directs that $21,049 and interest shall be paid to him out of the proceeds of the sale of the land. It is true that the general rule is that a cross-bill is indispensable to the grant of affirmative relief to a defendant in equity. But there is an exception to this rule, as well settled and uniformly applied as the rule itself. It is that no cross-bill is requisite to the application of the maxim that he who asks equity must do equity. It is that any relief, affirmative or otherwise, may be granted to a defendant which the principle embodied in this maxim requires the court to impose upon the complainant as a condition of granting all or a part of the relief he seeks, regardless of the pleadings which present it. . . . In Morgan v. Schermerhorn, 1 Paige, 544, 546, 19 Am. Dec. 449, the Chancellor said that, where one comes to a court of equity to seek relief against a usurious contract, he must pay or offer to pay the amount actually due, before he will be entitled to an answer as to the alleged usury, and added, 'If a party

comes here to seek equity, the court will compel him to do equity.' In Hudnit v. Nash, 16 M. J. Eq. 550, 553, 555, the second mortgagee exhibited a bill against Nash, the owner of the first mortgage, the third mortgagee, and the owners of the equity of redemption, in which he alleged that the first mortgage was usurious and void. Nash answered that he held the paramount lien, but he filed no cross-bill. The court said, 'But if a party comes into equity and asks relief, the court will compel him to do equity, although the defendant has not demurred to the bill;' that the complainant's decree must be upon terms of paying Nash's mortgage; that no decree could be made except such as could be granted on the prayer of the complainant's bill; and it entered a decree of sale of the premises, and of application of the proceeds, first, [491] to the payment of Nash's mortgage; second, to the payment of the mortgage to the complainant; and, third, to the payment of the third mortgage. This decree was affirmed in the appellate court. No cross-bills are required, to enable the defendants to secure decrees, establishing their rights in suits for accounting, partition, and specific performance. . . . In De Walsh v. Braman, 160 Ill. 415, 43 N. E. 597, Braman exhibited a bill in equity to compel De Walsh and his trustee to convey to him the title to two city lots. De Walsh answered that he had expended $1,118.77 in making improvements upon

the property, which had not been repaid to him, but he filed no cross-bill. Nevertheless, the Supreme Court of Illinois conditioned the decree for a conveyance of the title to the complainant, with the payment to the defendant of the $1,-118.77 and interest. The case in hand falls under the exception to the general rule which these authorities illustrate. Hutchison is not the actor here. He brought no suit, and he has asked no relief, save that he be hence dismissed, and that he have such other relief as may be just and equitable. He was called into the court below by the trust company, which besought that court to decree a sale of the shop tract, which was covered by his mortgage, and to apply the proceeds of that sale to the payment of the debt secured by the mortgage to the complainant. The decree below is founded upon this prayer of the trust company, not upon any claim or prayer of the defendant Hutchison. It directs the sale which the trust company sought, but conditions it with the payment out of the proceeds of the superior equitable lien of the defendant. It grants no relief to the defendant which the rules of equity jurisprudence did not, in the opinion of the circuit court, require it to impose as a condition of granting any part of the relief which the trust company asked with reference to the lien here in controversy. No cross-bill was requisite to warrant the action of the court below."

In Luckenbach S. S. Co. v. The Thekla, 266 U. S. 328, the Luckenbach Steamship Co. and the United States libelled the barque Thekla for a collision with the steamship F. J. Luckenbach and the owners of the Thekla filed a cross-bill against the steamer. Conceding that generally a counterclaim could not be asserted against the sovereign without its consent, the court, citing Goldthwaite v. Day, supra, said that the Government's libel was (p. 340):

> "like a bill for an account, which imports an offer to pay the balance if it should turn out against the party bringing the bill." [492]

As indicated in the general statement quoted above, the rule has no application where the relief sought is not within the scope of complainant's bill. This is well illustrated in Wilcoxon v. Wilcoxon (Ill. 1902) 65 N. E. 229. In a former case the bill was for the dissolution of a partnership and the adjustment of the partnership accounts, and the rule was applied in its full meaning. In a later bill the plaintiff in error sought to annul the articles of partnership, and, to excuse laches, pleaded the former proceeding upon the theory that the relief sought by the later bill could have been granted in the former proceeding without a cross-bill had not the defendants in error, over his objection abandoned it. The court said that in actions in equity for an accounting the prayer of the complainant authorizes the court, if the accounting shows the complainant to be indebted to the defendant, whom he has brought into the court for the purpose of hav-

ing the accounts between them judicially investigated and adjusted, to decree payment by the complainant accordingly, without a cross-bill on the part of the defendant; but that in the instance before it the relief sought by the later bill was entirely foreign to the scope and purpose of the earlier bill, and that therefore the relief could not have been granted in the former proceeding upon a cross bill.

I find that all of the items presented at the hearings leading to this report are germane to the adjustment, and conclude that they are all properly before me for consideration whether specially pleaded or not. [493]

Concessions.

Commencing with the Washington hearing in April and May of last year, the United States introduced exhibits in support of its claim that 63,197.96 acres, formerly within the Greater Sioux Indian Reservation, and which were restored to the public domain, and lay within the first indemnity limits in North Dakota, were patented to the company upon indemnity selections through mistake because the restoration of those lands was restricted to entry under the homestead and townsite laws. It likewise claimed that through mistake in drawing the lateral limits through portions of Montana and Idaho certain acres, aggregating 8,607.71 acres lying entirely outside the limits of the grant, were conveyed to the company in error. It further claimed that the United States had erroneously patented to the company

place and indemnity lands at Portland aggregating 4,295.52 acres, and at Ainsworth aggregating 61,-536.25 acres, the terminal limits in each case having been laid down beyond the point of actual construction of the road. The government contended that its officers were without authority to convey these lands, and that the company should either reconvey or, in cases where it had transferred to bona fide purchasers, should pay value. The company contended, on the other hand, that since the grants had not been fully satisfied, these lands, though possibly patented in error, should be charged to the grant. During the arguments in February of this year, the government waived its claim for reconveyance or compensation, with the result that the lands in question are to be charged to the grant in precisely the same manner as the railway had considered them. Even without such concession, I should have held that, on plain principles of equity, the foregoing classes of land should be charged to the grant un- [494] less and except the government were prepared to tender other lands to make up the deficiency. Since the case was submitted, the government has filed revised exhibits, in which the lands are charged to the grant, so that these questions are removed from further consideration.

In 1873 the railway company built westward as far as Bismarck on the Missouri River. The river itself was treated as the terminal limit for that section of the road. 27,488.62 acres to the west of the river were thus made to fall outside the lands earned

by that construction. Thereafter, in 1876, the acreage in question was withdrawn from entry and included within the Little Sioux or Standing Rock Indian Reservation. In 1880 the road was extended on west past these lands, and they were apparently lost to the grant. In 1898, however, the Land Office drew a perpendicular terminal at Bismarck which threw the reservation lands opposite the earlier construction. The government claimed in effect that the new terminal should control; that title to the disputed lands passed upon the 1873 location; that the company was in position to recover them, and that the lands should be charged to the grant, while the company insisted that the river should be regarded as the terminal as originally considered; that the lands in dispute were lost to the grant; and that it was entitled to indemnity. At the September hearing the government announced that it would not insist upon its position, and in the revised exhibits these lands are treated as lost to the grant.

A question was raised in the pleadings as to whether certain lands fell within or without the Yakima Indian Reservation, depending upon which of two surveys correctly define the southwestern boundary of the reservation. At page 210 of my previous [495] report I pointed out that I was not able to determine from the pleadings whether the lands in question were in fact within or without the reservation. At the hearing in January and February of this year it was orally stipulated during the testimony of Mr. Schwarm, for the purposes of this

suit, that about 22,000 acres should be considered as within the reservation, and, hence, not chargeable to the grant, that 831.95 acres should be considered as outside the reservation and properly selected by the company, and, hence, chargeable to the grant, and that about 1,100 acres should be considered as lying outside the reservation, but as having been put into a national forest, and, hence, subject to the same ruling that may apply to any other withdrawn lands. Effect to this stipulation is given in the revised exhibits.

In the earlier years of the administration of the grants the company was permitted to satisfy losses suffered by the 1870 grant in the indemnity limits in the 1864 grant, and vice versa. By decision December 20, 1897, reported in 25 L. D. 511, the Commissioner was instructed to administer the grants separately. The necessary rearrangement of losses is reflected in the exhibits, which treat the two grants as separate and distinct.

I shall proceed now to the adjustment.

GRANT OF JULY 2, 1864.

Reconciliation as to Extent of Deficiency.

The grant of 1864 is concededly deficient, in the sense that the losses have not been fully satisfied. The United States, after all concessions, by its exhibit 103, revised, fixes the deficiency at 2,111,479.52 acres. The Northern Pacific by its corrected exhibit 132 fixes that deficiency at 2,572,800.87 acres. The difference between the two quantities is comprehended within the following items: [496]

1. Portage, Winnebago & Superior conflict, 417,400.66 acres. The government deducts this area from the grant, while the railway treats it as having been lost to the grant, and thus as constituting proper base for indemnity. Indemnity was, in fact, allowed, but the government insists that other base be supplied, whereby the deficiency would be decreased.

2. Error in Montana place limits, 5,435.46 acres. The government shows that certain townships in Montana contain more than the conventional number of acres. The railway, admitting that excesses exist in the particular townships in that quantity, maintains that elsewhere in the grant many townships are deficient and that no allowance should be made by reason of the greater or less number of acres per township. Of course, the effect is that the government's position would reduce the deficiency by that quantity. This contention must be distinguished from the Montana and Idaho lateral error involved in the concession mentioned above.

3. Lieu selections in indemnity limits, 38,485.23 acres. This acreage constitutes lands selected by the railway within the indemnity limits of the grant in lieu of lands relinquished under so-called relief acts, which entitled the company to make selections in lieu of lands relinquished by it to settlers. The United States argues that since the company could have made such selections elsewhere than in its own indemnity limits, it should be charged to the extent by which it thus depleted its limits, while the company contends that since, by the terms of the relief

acts, it was not excluded from its indemnity limits in making such selections, it should not be charged for making them there. The government's position would reduce the deficiency by the quantity involved. The company would disregard [497] the circumstance entirely as having no bearing whatever upon the quantity of the deficiency.

These three matters I shall now discuss, in order to arrive at what I consider a correct statement of the deficiency.

I. Deduction for Portage, Winnebago & Superior Grant.

In my first report, speaking only to the pleadings, of course, and not to the actual facts, I held that upon the filing of the map of definite location by the Portage, Winnebago & Superior Railroad Company the title passed to it subject to be defeated only by failure to construct, and that thereby the lands fell within the terms of proviso 1 of Section 3 of the Act of 1864, deducting land previously granted, if the route of the Northern Pacific should be found upon the line of any other railroad route to aid in the construction of which lands had theretofore been granted, as far as such routes were upon the same general line.

By Your Honor's Order upon that report this became the law of the case. I cannot refrain, however, from calling attention to the case of United States v. Southern Pacific Railroad Company, 146 U. S. 570. In that case the senior grant was to the Atlantic & Pacific. A junior grant was made to the Southern

Pacific. The former company filed its map of definite location. It did not, however, construct its road, and its grant was afterward forfeited to the United States. The Southern Pacific filed its map of definite location and did build its line upon that route, and thereupon claimed to have earned the lands which the Atlantic & Pacific had lost by its failure to construct. The Supreme Court, speaking by Mr. Justice Brewer, held square-toed that, by the filing of the map of definite location under the [498] senior grant, the title passed to that grantee, and, therefore, that the junior grantee could by no possibility get any of the land. It was held further that the failure of the Atlantic & Pacific to build, and the forfeiture of its grant, did not in any wise change this rule; that the forfeiture was not made for the benefit of the Southern Pacific, but for the benefit of the United States. In that case there was a proviso in the junior grant that its grant should be subject to the rights of the Atlantic & Pacific. This proviso, however, was not dealt with as having any bearing, although an impression is left that it might have had some effect. In the subsequent cases of United States v. Colton Marble and Lime Company and United States v. Southern Pacific Railroad Company, decided together and reported in 146 U. S. 615, that clause was held to have no bearing whatever upon anything but indemnity lands. Thus the determination that the place lands, by reason of the definite location of the Atlantic & Pacific line, did not pass to the Southern Pacific was not in any

wise affected by that proviso. These cases, though cited to other points not requiring that they be critically examined, were not called to my attention at the previous hearing as touching this question; and I believe were not called to Your Honor's attention at the argument on the exceptions to my report. It is, therefore, with some degree of satisfaction that I am able at this time to point out how precisely the determination of the question by the Supreme Court of the United States confirms the correctness of the view we took. Of course, under the proviso in Section 3, which we are considering, it must be remembered that the land in question, by the very terms of the act, is deducted from the grant. Nothing was received, and, hence, no indemnity could be claimed. In that respect the cases differ; [499] but upon the proposition that on filing of the map of definite location title passed to the senior grantee as of the date of its grant so that nothing could pass to the junior, the cases are identical.

At this point and upon the question of fact involved, Govt. exhibit 76 shows the precise situation. Area A and area B together constitute an aggregate of 370,378.05 acres, approximately the quantity alleged in the bill. The United States now claims that not only areas A and B, but also area C should likewise be deducted from the grant, bringing the total deduction to 417,400.46 acres. In argument Mr. Frost maintained that, while the two roads were parallel down to range 11 east, from that point, by

reason of the divergence in a northwesterly direction to Bayfield of the located Portage road and the almost directly eastern course of the Northern Pacific to Ashland, they were not on the same general route. I hold that they are. We must consider the condition of the country at this time, and what Congress had in mind. There were no railroads in that portion of Wisconsin. The grant to the Portage road was to afford railroad facilities for that portion of Wisconsin along Lake Superior. The distance between the termini of the two roads is about 17 miles. While, as it appears on the map, it looks like a very sharp departure from parallelism, I think it must be said certainly that 17 miles difference between the termini does not take it away from the same general direction, using the word "direction" as equivalent to the word "line", as employed in the act. The people of that day, the Congress of that day, did not suppose that any community needed a road every two or three miles. That was an unheard-of and undreamed-of luxury for the times. The pioneer farmer, if he could get within 17 miles of a [500] railroad, thought he was fortunate. Without elaborating on the subject, it seems to me perfectly evident that these two routes are upon the same general line. Therefore, without question area A, 347,-141.24 acres, must be deducted from the grant. Area B is sought to be deducted because it is said the road between Bayfield and Ashland is a part of the same general line. I do not think so. I think the routes ended at their respective termini, and that

only the land that was comprehended within the grant to the Portage road to Bayfield should be deducted. It follows, of course, that area C should not be deducted. I have not been able to understand the contention of plaintiff in respect of that area. Therefore on this point I hold there should be deducted from the grant 347,141.24 acres, thus reducing the area of the grant, and consequently the deficiency, by that number of acres. In order to dispose of all questions arising in this Portage issue, I may add that the bill sought to obtain judgment against the railroad for the value of the lands secured as indemnity for the supposed loss to the Portage road. On argument the plaintiff now concedes that the company may keep these lands, claiming only that it shall assign proper base for its selections. I shall have occasion to determine later on in this report what is proper base, and whether any base is needed. I only call attention to that question now without undertaking to determine it.

II. Error in Montana place limits, 5,435.46 acres.

This figure is the estimated excess area in certain townships in place limits in the state of Montana. In 1925, during the process of adjustment in the general Land Office, it was found [501] that an error had been made by the Commissioner in laying down the northern and southern lateral limits for a considerable distance through Idaho and Montana at the time the road was definitely located. The country not having been then surveyed, the Commissioner determined the limits by protracting or extending

existing lines of survey. To correct the convergence of the meridians of longitude because of the earth's curvature, a jog is taken to the east or west at regular intervals of four townships, or twenty-four miles. By mistake the Commissioner placed the jog in the wrong direction, so that when the survey was made, and superimposed upon the Commissioner's map, the latter was shown to be in error. The result was to throw certain lands formerly considered place lands into the first indemnity limits, first indemnity lands into second indemnity, and second indemnity lands outside the grant. About 145,000 acres were thus shifted from one limit to another. The quantity patented outside the limits was 8,607.71. This is the quantity for which the government originally asked compensation, as for lands erroneously patented, but which, in argument, as stated above, it conceded might be charged to the grant.

The 5,435.46 acres is a different item, but is related in the sense that it is an extension eastward of the same error. The Land Office corrected the limits for a distance, and then estimated the error beyond at 13,312 acres, finally reduced in testimony to 5,435.46.

The item as originally estimated was deducted from the adjustment for the state of Montana and, in consequence, the adjustment for the entire grant, transmitted by the Secretary of the Interior to the Joint Committee of Congress as a preliminary report March 8, 1925, as is shown at pages 386 and 391 of the report of the Joint Committee hearings.

[502]

The railway objected to the proof upon the ground that the item was not alleged, but for reasons given above I overrule that objection.

Mr. Schwarm for the company testified that certain townships were over-size, his testimony corresponding closely with that of Mr. Barber for the government; but he claimed, generally, that other townships along the entire line were short of the conventional acreage. The company did not offer evidence of any specific instances, although Govt. exhibits 229 and 230 themselves show that along certain portions of the road the new lateral lines would actually enlarge the place limits. I think it may be regarded as a matter of common knowledge that in the public land states, by reason of convergence of meridians and errors in survey, the north and west tiers of sections making up the township are always, or at least usually, either over, or short of, 640 acres; but as to whether in the aggregate the quantity would be over or short I have no knowledge and do not consider the railway's evidence as sufficient to show it. The testimony and statements of counsel concerning this error are found at the following pages of the transcript: 27, 148-149, 320, 329-339, 601, 733-746, 880-881, 918-919, 1049-1050, 1435-1437.

Neither orally nor in its brief did the government advance any argument concerning this item, though requesting a finding that it be deducted. The company, in its brief, insisted that the original place limits as established by the Land Department ought

to control, and requested a finding that the evidence was insufficient to justify a correction.

From the outset the company has freely conceded the Idaho-Montana error, where the lateral limits were actually re-drawn. [503] It is testified that the present error is an extension of the former. The company has, in substance, admitted the error and has not offered definite proof to establish any compensating error. While it is difficult to conclude that the quantity of place lands thrown into the first indemnity limits represents the actual area erroneously received by the company, yet no contention was made as to that, and for all that has been said my difficulty may not involve any valid objection. An error being admitted, and the witnesses for the government and the railway being practically in accord as to the excess in the place limits, I feel compelled to find as requested by the government and shall so rule.

III. Lieu Selections in Indemnity Limits, 38,485.23 acres.

Congress passed several acts, called generally relief acts, for the relief of settlers occupying lands which fell within the limits of railroad grants upon the filing of maps of definite location. As will be recalled, the railroad title, on the filing of the map of definite location, attached as of the date of the grant. If in the meanwhile a settler had entered, the relief acts came to his aid by providing that the railroad, upon relinquishing to him, might select

other lands in lieu of those relinquished. The first of these was a general statute of June 22, 1874, 18 Stat. 194, which may be found in the Joint Committee Record (J. C. R.) at page 79. An extension to other situations was made by the act of August 29, 1890, 26 Stat. 369, J. C. R. 82. The act of October 1, 1890, 26 Stat. 647, J. C. R. 85, contrariwise, permitted the settler to leave the railroad land and transfer his rights elsewhere. The act of July 1, 1898, 30 Stat. 620, J. C. R. 89, is the one most often invoked. It provides that [504] where the purchaser, settler or claimant refuses to transfer his entry, "The railroad grantee or its successor in interest, upon a proper relinquishment thereof, shall be entitled to select in lieu of the land relinquished, an equal quantity of public land, surveyed or unsurveyed, not mineral or reserved, and not valuable for stone, iron, or coal, and free from valid adverse claim or not occupied by settlers at the time of such selection, situated within any State or Territory into which such railroad grant extends, * * *," and further, that the Secretary of the Interior ascertain and cause to be prepared and delivered to the railroad grantees list of tracts which had been purchased or settled upon or occupied. Extensions of that act and certain relief acts of limited application may be found for convenience at J. C. R. 91, 92 and 93.

In exercising such lieu rights the Northern Pacific selected 38,485.23 acres within the indemnity limits, though, as illustrated by the act of July 1,

1898, it might instead have made its selections out of even-or odd-numbered sections, surveyed or unsurveyed, within any state or territory into which the grant extended. Some of the selections in question were made before the land was surveyed, and a preponderant part was selected within areas that afterward, when the second indemnity limits in Montana and Idaho were established, fell within those limits. Some selections also were made within areas in Wisconsin and Minnesota that afterward became mineral indemnity limits. Of the entire 38,485.23 acres, only 1,634.23 acres were selected when the land was surveyed and available for selection under the indemnity provisions of the grant.

The United States deducts the area in question from the deficiency in its recapitulation of the statement of the adjustment for the several states, and for the grant as a whole. Thus, Govt. [505] exhibit 103 revised, for the entire grant of 1864, carries it as follows: "Deduction, area within the odd sections of the primary and indemnity limits, selected by the company under lieu acts . . . 38,485.23." As heretofore stated, the company makes no deduction from the deficiency by reason of these selections. The government did not mention this issue either in oral argument or in its brief. In the railway's brief attention is called to the fact that the 1874 relief act, cited above, by its terms, as interpreted by the Land Office, provided that the selections might be made within the limits of the grant and in either even or odd sections, and that the 1898

act and similar acts under which the selections were made contained no specification except, as in the 1898 act, that the selections might be made within any state or territory into which the grant extended, and contends, therefore, that the company had the option of selecting either within or without its limits. It claims also that the grant has been charged with the acreage for which the lieu scrip was issued, and that to charge again for the selection would result in a double charge.

Neither party proposes a finding upon this subject, except only as a finding thereon would be implied in the company's request for ascertainment of the quantity of the deficiency.

The company's claim that a double charge results from the plaintiff's treatment of these selections appears to be well taken. The United States was not injured by the selections, because it was spared the selection of equivalent land elsewhere. The company did diminish its indemnity limits when it made relief act selections therein, but it is not complaining nor asking for any compensating indemnity elsewhere. I find no reason for the deduction, and rule that none should be made. [506]

The rulings which I have made upon the three foregoing points enables me now to state the deficiency under the grant of 1864:

	Acres	Acres
Deficiency as calculated by plaintiff		2,111,479.52
Add: Portage, Area B	23,236.81	
Portage, Area C (Tr. 86)	47,022.61	
Selections under relief acts	38,485.23	108,744.65
Deficiency		2,220,224.17
The same result is reached by comparison with the deficiency as calculated by the company, or		2,571,765.46
Less: Portage, Area A	347,141.24	
Montana place error	5,435.46	352,576.70
		2,219,188.76
Add: Selected lands charged by company but conceded by it to be mineral		1,035.41
Deficiency		2,220,224.17

The deficiency thus found is represented by unsatisfied losses in the hands of the company, as follows (N. P. exhibit 138 revised; Tr. 944):

Unsatisfied prior losses in entire grant		106,828.08
Unsatisfied subsequent losses in states not having second indemnity limits:		
North Dakota	7,618.00	
Washington	85,659.25	
Oregon	2,851.92	96,129.17
Unsatisfied subsequent losses in states having second indemnity limits:		
Wisconsin	6,400.66	
Minnesota	219.92	
Montana	124,992.06	
Idaho	23,922.22	155,534.86
Unsatisfied mineral losses		2,258,356.88
Total unsatisfied losses—Forward		2,616,848.99

Total unsatisfied losses—Forward	2,616,848.99
Less: Portage, Winnebago, and Superior Area A	347,141.24
Net unsatisfied losses	2,269,707.75

Now, this statement of unsatisfied or unindemnified losses is not intended to be exact. It is taken from the company's revised exhibit, supplemented by Mrs. Schwarm's testimony, without reconciliation with plaintiff's exhibits, which were prepared before the numerous concessions and other revisions had been made. I think possibly I should deduct from the net total the area of 40,623.10 acres within the indemnity limits patented to St. Paul & Pacific Railroad Company which after suit (139 U. S. 1) conveyed to the Northern Pacific without the latter's designating base. This would reduce the net unsatisfied losses very nearly to the ascertained deficiency. Yet even if all the figures were brought down to date and reconciled, the unsatisfied losses would never precisely equal the computed deficiency, because in matching losses and selections the area of the loss did not always exactly equal the area of the selection, and because clerical errors inevitably occurred in the administration of the grant. Roughly, the ascertained deficiency corresponds with the losses on hand. The purpose of setting forth the unsatisfied losses is to show that they are of several kinds, and that the greater part is mineral.

IV. Lands Selectable for Mineral Losses; Meaning of "Agricultural Lands".

The deficiency in the grant having been ascertained, the problem is, where and how may the railroad make it up? The United States contends that even if the national forests and other govern- [508] ment withdrawals are open to the invasion of the company for this purpose, it is quite impossible to satisfy any considerable portion of the deficiency, because the lands sought to be taken are of such character that, under the terms of the act, they cannot be selected for the particular losses that the company has on hand. Thereupon various questions arise, around which the controversy rages, for the purpose of determining whether this contention of the government is correct or whether, on the other hand, the railway may take these lands in satisfaction, in whole or in part, of this deficiency.

What is the interpretation to be placed upon the phrase "agricultural lands" in the third proviso to Section 3 in respect of the selection of indemnity for mineral losses? The language is:

> "Provided, further, That all mineral lands be, and the same are hereby, excluded from the operations of this act, and, in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd-numbered sections, nearest to the line of said road, and within fifty miles thereof, may be selected as above provided."

The lands to which this interpretation is to be applied are principally that vast tangle of mountains and forests, and rivers and valleys, contained in the national forests of the United States, beginning with the Custer on the east, and extending in almost unbroken connection to the group of forest reservations along the Cascade range. In general, the lands may be identified as the hatched portions of the national forests shown upon Govt. exhibit 88.

The United States appeals to the ancient and fundamental rule of statutory construction that words are to be taken in their literal meaning or according to their common usage, as the subject [509] and the context and the surrounding circumstances may require, but that where both the dictionary sense of the term and common usage are identical, there is no room for interpretation, and the language used must be deemed used in that precise sense and no other.

On the other hand, the company maintains that the expression is one of classification, not of definition; that the term "agricultural" is used in distinction to the term "mineral", and was intended to denote all lands not mineral in character within the meaning of Section 3. The question thus raised is of controlling importance because if the government's contention be sustained, there is no place that the company may go to satisfy the bulk of its deficiency, and it will be quite useless, until this question is determined, to discuss the other questions that arise.

Preliminarily to an analysis of that language and of the authorities cited one way and the other concerning it, I shall consider specific cases comprehended on the one hand by the term "mineral", and on the other by the term "agricultural".

The expression "mineral lands" has been given a very broad interpretation as including not only metalliferous lands, but, as well, lands valuable for deposits not metalliferous, including marble, slate, building stone, clays, petroleum, asphaltum, phosphate, and such an exceptional instance as guano. For a comprehensive, sweeping, determination of what is mineral, one should read the opinion of Mr. Justice Brown, with its wealth of illustration, and its citation of authorities going back to the early English cases, in Northern Pacific Railway Company v. Soderberg, 188 U. S. 526, in which it was held that a portion of a [510] certain odd-numbered section within the place limits of the grant of 1864 in the state of Washington, valuable solely or chiefly for granite quarries, was mineral.

Similarly, the term "agricultural" has been given equally broad signification. Thus, under the homestead law, in applying the requirement of "cultivation", which etymologically has the same origin, in part, as "agricultural", the Land Office has permitted entries upon plow lands, grazing lands, lands chiefly valuable for timber but which, upon removal of the timber, are tillable, and quite liberally all lands which the settler might wish in good faith to occupy as a home, however erroneous his judgment

might be as to the fitness of the lands for cultivation. The usual instance in which his application has been questioned is where the value of the land for timber was such as to have raised a question of his good faith.

Notwithstanding the wide interpretation given to the two terms, you come at last to a sort of no man's land, neither mineral nor agricultural under any possible definition of those expressions. In this case the no man's land comprises much of the lands in N. P. exhibits 144 and 146, by which the company seeks to lay mineral losses directly upon first indemnity and mineral indemnity lands within forest and other reserves. It may also comprise a substantial part of the lands described in N. P. exhibit 145, by which the company seeks to lay mineral losses upon first indemnity lands not embraced in reserves, in substitution for subsequent losses used long ago in the selection of such lands, in order to release those losses so that they may be used to take up second indemnity lands within reserves which, by reason of being more than fifty miles from the road, are not [511] selectable directly for mineral losses; for the government in its argument upon the subject of substitution or rearrangement of base makes the same objection to these substitutions that it makes to selections under N. P. exhibits 144 and 146, viz: that the company has failed to sustain the burden of proving that the lands sought to be supported by mineral base are agricultural.

The selections under N. P. exhibits 144 and 146 in first indemnity and mineral indemnity aggregate

1,340,000 acres, of which about 10,800 acres, or less than one per cent, are classified agricultural by the government in its testimony and its exhibits 237, 244 and 248:

Mineral Selections in First and Mineral Indemnity Limits Within National Forest Boundaries:

Forest	Acres Agricultural	Acres Non-Agricultural
Kaniksu	Nil	54,027.39
Pend Orielle	40.	1,379.05
St. Joe	Nil	52,044.12
Clearwater	2,720.	115,876.45
Selway	224.	80,880.29
Kootenai	1,161.	36,347.80
Blackfeet	Nil	12,646.45
Flathead	4,625.	190,326.04
Lolo	Nil	25,527.23
Lewis & Clark	Nil	41,080.
Helena	Nil	9,180.
Deerlodge	361.	37,913.12
Jefferson	454.20	86,390.35
Beartooth	80	127,970.95
Absaroka	129.30	198,217.59
Gallatin	Nil	39,684.
Madison	Nil	7,670.54
Bitter Root	Nil	31,863.36
Shoshone	240.	47,807.99
Snoqualmie	Nil (Approx.)	57,200.
Wenatchee	1,128.67 "	53,400.
Rainier	Nil	25,600.
Totals	10,803.17	1,333,032.72

[512]

The aggregate of the proposed substitutions is approximately 664,000 acres additional, with respect to which the government insists that the company

has failed to offer any proof of agricultural character. The issue, therefore, involves in all about 2,000,000 acres.

Counsel for the government have appealed to the dictionary sense of the word "agriculture", and have gathered together the dictionary definitions beginning with Dr. Johnson, in 1755, down to and including that vast repository of word knowledge, the Oxford Dictionary. Thus, Dr. Johnson: "the art of cultivating the ground; Tillage; husbandry," the Oxford: "the essence and art of cultivating the soil; including the allied pursuits of gathering in the crops and rearing live stock; tillage; husbandry; farming, (in the widest sense)," and the Century: "the cultivation of the ground, especially cultivation with a plow and in large areas in order to raise food for man and beast; husbandry; tillage; farming," and it is argued that agricultural lands mean lands that may be subject to the pursuit of agriculture in the sense of these definitions. I do not think it is at all possible to adopt this dictionary sense. It would be quite contrary to known conditions existing in the territories in which the grant to the railroad was to be located. Whatever the word "agricultural" means, it certainly means much more than this.

So, likewise, the cases cited in support of their construction of the phrase "agricultural lands" cannot throw much, if any, light upon the subject. Those cases all arise under the timber and stone act, the homestead law, or other specific legislation in

which it becomes necessary to compare the value of the land for tillage and its value for some other statutory purpose. [513]

In further application of their contention counsel put in evidence the testimony of the foresters who had classified the lands in these various reserves under another statute, and for a different purpose than any involved here. The classification was into agricultural and non-agricultural lands. Their testimony is intelligent; their classification was apparently made with care and accuracy. They introduced airplane pictures taken over these national forests, and when one has become accustomed to the perspective, they show a condition familiar to Your Honor and to me. One sees from those pictures the small areas of valley land, strictly agricultural according to the definition. The foresters admit only some 10,000 acres in all this vast area to be of this type. One sees the conifers in solid growth, their trunks almost touching one another in the valleys, extending up the mountain side, the species changing as they reach the higher levels in the age-old struggle of their forebears to reduce the rock of the mountains to the soil of the valleys. One observes the mountain tops of solid granite, or, in some of the lower levels, of volcanic rock. In these regions, as shown by the photographs and as known to men familiar with them, there is nothing to suggest the conception of "agricultural lands" or of "agricultural" as defined by the dictionaries, or as commonly understood; nothing to suggest the idea of

the spring time and the harvest, of the plowing and the sowing and the reaping; nothing to suggest the fixed habitation of man with his homes and his outbuildings, his fences and cultivated fields. Rather one's mind goes to the nomadic tribes, like the Jews of Abraham's time, living in tents and following their flocks into the hills and along the river valleys for grass and water. One thinks, too, of the cedars of Lebanon [514] and of the mighty forests of redwood which once covered the Pacific slope from California to the Bering Sea.

Counsel cite various speeches in the Congress that was considering the act, particularly referring to the description by Governor Stevens of these lands and his insistance upon the area of tillable lands, and to the account that Captain Mullan gave. They cite, too, certain language from various decisions of the courts. From it all they conclude that, with the exception of a few scattered tracts, the term "agricultural lands" cannot be applied to the lands in these reservations, and that they, therefore, cannot be selected for mineral losses.

I am not greatly impressed with the argument founded on what was said by various members of Congress touching the agricultural lands to be found along the line of the road west of the Missouri River. Doubtless they were appealing, with the strongest arguments they could think of, to Congressmen from the northeast and middle west, to vote for the bill. Even if their fervor of expression was justified, it does not necessarily follow that

what they said applies to the unselected lands now lying in the indemnity limits of the grant. I have already expressed the opinion that the dictionary sense of the words "agricultural lands" is not sufficiently broad to cover the intent of this phrase. About that matter I have no sort of doubt, but if we extend that phrase to cover, under certain circumstances, pasture land, and, under other circumstances, timber lands susceptible of cultivation after the timber is removed; in short, if we give it its widest possible significance according to the dictionaries and the decisions of the courts and the Land Office, I still think it does not come up to the purposes of Congress. [515] I think it is too narrow; I think it excludes too much. My views upon the whole question will be more fully stated presently.

Mr. Frost refers to two other land grants containing the identical proviso we are considering. It does most certainly appear that the phraseology had become established so that it was used without any question as late as 1871. No controversy had arisen over it, and Congress and the Land Office, as well as other railroads applying for grants of land, seemed content with the phrase as it stood. From the beginning of the administration of this grant it was consistently the understanding of Land Commissioners and Secretaries of the Interior that the phrase was one of classification and was intended to mean, and it was held did mean, all lands not mineral in character. In a sense, therefore, I may remark in passing, when subsequent statutes used

the same phrase they took it as construed by the Department. Now it is quite true that, by the terms of the act under which this suit is brought, this court is required to correct all errors of construction and administration, whether of law or of fact, committed by the Land Department of the government, but that does not mean that there shall be no persuasive force, no effect whatever, given to the rulings of that department. It means only that where they are manifestly wrong, the court shall so adjust the grant as to correct such errors.

It must be continually borne in mind that, when this grant went into effect, the United States was engaged in a terrific conflict to preserve its own existence. It must be remembered that, when the resolution of 1870 was adopted, the war had been over but five years. Now, out of that struggle came wounded and disabled soldiers, thousands upon thousands of them. Other thousands [516] upon thousands had left their homes and occupations, many of them as young men, and had come back with no place to go nor any occupation to follow. In great part it was the intention of these grants to the Northern Pacific to open up a country where these returning soldiers might find homes, and make settlement, and build up new commonwealths to be added to the Union. The whole spirit of the act breathes that purpose, just as plainly as it does the policy towards mineral lands, thus stated by Mr. Justice Field in Barden v. Northern Pacific Railroad Company, 154 U. S. 288, 318:

> "The tract granted covered a belt believed to be rich in minerals of gold and silver, and the United States were at the time engaged in a terrific conflict for the preservation of the Union, incurring an immense debt, exceeding two thousand millions, and many of their citizens, engaged in the struggle, looked forward hopefully and confidently to this source for relief to the burdened treasury. And we cannot with reason suppose that, under these circumstances, the United States intended that the control of this source of wealth and relief should be taken from them. It passes belief that they could have deliberately designed in this hour of sore distress and fearful pressure upon their finances, to give away, to a corporation of their own creation not only an imperial domain in land but the boundless wealth that might lay buried in the mineral regions covered by 80,000 square miles."

This language is not at all weakened by the fact that the forces of private greed and gain so altered the policy of the government that its mineral resources were thrown open to public exploitation.

It might be remarked in passing, too, that this language is consistent with the settled practice of the Department and government officials in putting agricultural lands and mineral lands in opposition to each other.

I see no reason why one policy should apply to the place limits and another to the indemnity limits.

All lands within [517] the place limits passed by the grant, except mineral. Why should a different policy be thought to apply with respect to the indemnity limits, except that the coal and iron exclusion is compelled by the use of the word "agricultural" as opposed to "mineral"?

It is certain that the Interior Department was administered, at the time of this grant and for many years thereafter, by men who had lived through the trying years of the Civil War, many of whom had taken part in it, Secretaries, Commissioners of the General Land Office, and heads of bureaus in the Department. I think it ought to be assumed that these men were more familiar with the intention of Congress than we are to-day. I think great effect should be given to the construction which they placed upon this phrase, and to the manner in which it was consistently and continuously, down to the passage of the act under which this suit was brought, administered by them. Of course, we may observe in the opinions of Commissioners and Secretaries, in individual cases, a tendency in after years to tighten up on this construction to limit it as far as possible. Times had changed, views had altered, other questions had obtruded themselves upon the construction of this grant. Hostility against railroad grants and railroad usurpations had been gathering, and it is only to be expected that, to a certain extent, this sentiment should be reflected. I cannot believe that the men who administered this grant through the early

years could have been mistaken as to the intent of Congress.

Much argument is made by the government to the effect that the Department had under its control and administration all the public lands of the United States, running into millions and millions of acres, that they had not the time to give careful [518] attention to each subject, that they took the grant as meaning what the company said it meant, and, so to speak, let it go at that. I cannot think that this is a just explanation of the opinion entertained by the officials of the Land Department. It is apparent that for many years—I will not stop to run back and see how many—the administration of railroad grants was committed to a special division of the General Land Office. It had heads and it had counsel. They gave careful attention, as the reports of the Department show, to each detail and to each step of that administration. I am persuaded that the interpretation placed upon this phrase was intentional and upon deliberation.

There were no timber and stone acts, no desert land acts, no acts of Congress throwing open to settlement and exploration under any particular regulations the mineral lands of the United States. There were no forest reserves nor game preserves, no thought or idea of maintaining watersheds. All the various complications in the administration of the public lands of the United States were introduced long after this act, and in view of considerations that obviously had never occurred to the exec-

utive or legislative branches of the government. To undertake to construe this part of the act in the light of all this subsequent legislation, of all the subsequent proclamations creating forest and other reserves, is futile.

The argument is made that the construction of the phrase "agricultural lands," if used in opposition to mineral lands, would mean only "other lands," and that mineral indemnity losses might as well, therefore, have been put in the same clause, and in the same connection, as the indemnity provision for general losses. By the general indemnity clause in Section 3, it is en- [519] acted that whenever prior to the definite location of the road any of the sections, or parts of sections, shall have been "granted, sold, reserved, occupied by homestead settlers, or preempted, or otherwise disposed of," other lands should be selected by the company in lieu thereof, and the argument runs that there was no necessity for a separate proviso for mineral losses. This, to my mind, taken at its face value, and as stated, is a powerful argument and difficult to answer; but even taken at its face value and with all the force that is conveyed by the manner of its presentation, I still think that it is not sufficient to overcome other considerations. An analysis of Section 3 will disclose that the argument is specious rather than sound. By the general indemnity provision quoted above, it would result that the company might select any lands, mineral as well as non-mineral, for those losses because the unqualified

phrase is "other lands" not more than ten miles beyond the limits. Now, by construction it has always been said, and it must be held, of course, that the words "other lands" do not include mineral lands, except coal and iron, because by the terms of Section 3 mineral lands are excluded from the operations of the act. Coal and iron lands would thus have been excluded were it not for the addition that mineral should not be held to include iron or coal. If, therefore, the phrase "agricultural lands" were equivalent to the phrase "other lands," it would follow that for mineral losses the company might select any other lands, including coal and iron, and that only minerals other than coal and iron would be excluded from selection.

For some reason, however, Congress did not intend this result, and by the use of the term "unoccupied and unappropriated agricultural lands," within prescribed limits, it meant to exclude [520] from the selection for mineral losses all mineral lands, including coal and iron. To put the whole provision in plain and direct language, the effect of the statute, if agricultural lands be construed as used in opposition to mineral lands, is this: for the general losses in place, the company might select any other free lands in the indemnity limits, including coal and iron, but not other mineral lands; and for mineral losses it might select within the limits any other free lands non-mineral in character. Thus the only difference between the indemnity provisions for general losses and for mineral losses is the coal and

iron lands. The only difference in location is the difference expressed in the words "within fifty miles thereof" for mineral losses, and "not more than ten miles beyond the limits" for general losses. The same idea might have been expressed, instead of the short phrase "agricultural lands," by a circumlocution, as, for instance, "other lands not mineral in character, and not coal and not iron," thus making sure of the difference between the selection for mineral losses and for general losses. Construing the phrase "agricultural lands" as I have construed it makes it mean precisely that, nothing more and nothing less.

As I read the opinion of Secretary Ballinger in Northern Pacific Railway Company, 39 L. D. 314, he held to the same construction, so far as it was necessary for him to consider it in that case. The question before him was whether admittedly coal lands could be taken as indemnity for mineral losses. Conceding that for general losses they might be so taken, he ruled that for mineral losses they could not be selected because they were not agricultural lands. This was as far in the analysis of the term "agricultural lands" as it was necessary for him to go, and noth- [521] ing more is to be made out of the opinion than just that.

Concededly, the term "agricultural lands" may be read in the sense the government attaches to it; but obviously within familiar rules of construction it may be read as a term of classification. The whole thing turns on what Congress intended in the use of

the phrase. There are certain fundamental rules of construction, reference to which may be useful here. Sir William Blackstone thus states the rules I have in mind (Bl. Comm., Introd., Sec. 2);

> "The fairest and most rational method to interpret the will of the legislator is by exploring his intentions at the time when the law was made, by SIGNS the most natural and probable. And these signs are either the words, the context, the subject matter, the effects and consequence, or the spirit and reason of the law. Let us take a short view of them all:—
>
> 1. Words are generally to be understood in their usual and most known signification; not so much regarding the propriety of grammar, as their general and popular use. Thus the law mentioned by Puffendorf which forbad a layman to LAY HANDS on a priest, was adjudged to extend to him, who had hurt a priest with a weapon. Again, terms of art, or technical terms, must be taken according to the acceptation of the learned in each art, trade, and science. So in the act of settlement, where the crown of England is limited 'to the princess Sophia, and the heirs of her body, being protestants,' it becomes necessary to call in the assistance of lawyers, to ascertain the precise idea of the words 'heirs of her body,' which, in a legal sense, comprise only certain of her lineal descendants.
>
> 2. If words happen to be still dubious, we may establish their meaning from the CON-

TEXT, with which it may be of singular use to compare a word or a sentence, whenever they are ambiguous, equivocal or intricate. Thus the proeme, or preamble, is often called in to help the construction of an act of parliament. Of the same nature and use is the comparison of a law with other laws, that are made by the same legislator, that have some affinity with the subject, or that expressly relate to the same point. Thus, when the law of England declares murder to be felony without benefit of clergy, we must resort to the same law of England to learn what the benefit of clergy is; and, when the common law censures simoniacal contracts, it affords great light to the subject to consider what the canon law has adjudged to be simony.

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3. As to the SUBJECT MATTER, words are always to be understood as having a regard thereto, for that is always supposed to be in the eye of the legislator, and all his expressions directed to that end. Thus, when a law of our Edward III. forbids all ecclesiastical persons to purchase PROVISIONS at Rome, it might seem to prohibit the buying of grain and other victual; but, when we consider that the statute was made to repress the usurpations of the papal see, and that the nominations to benefices by the pope were called PROVISIONS, we shall see that the restraint is intended to be laid upon such provisions only.

4. As to the EFFECTS and CONSEQUENCE, the rule is that where words bear either none, or a very absurd signification, if literally understood, we must a little deviate from the received sense of them. Therefore the Bolognian law, mentioned by Puffendorf, which enacted 'that whoever drew blood in the streets should be punished with the utmost severity,' was held after long debate not to extend to the surgeon, who opened the vein of a person who fell down in the street with a fit.

5. But, lastly, the most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the REASON and SPIRIT of it; or the cause which moved the legislator to enact it. For when this reason ceases, the law itself ought likewise to cease with it. An instance of this is given in a case put by Cicero, or whoever was the author of the treatise inscribed to Herennius. There was a law, that those who in a storm forsook the ship should forfeit all property therein; and that the ship and lading should belong entirely to those who staid in it. In a dangerous tempest all the mariners forsook the ship, except only one sick passenger, who, by reason of his disease, was unable to get out and escape. By change the ship came safe to port. The sick man kept possession, and claimed the benefit of the law. Now here all the learned agree, that the sick man is not within the reason

> of the law; for the reason of making it was, to give encouragement to such as should venture their lives to save the vessel; but this is a merit which he could never pretend to, who neither staid in the ship upon that account, nor contributed any thing to its preservation."

I think the phrase "mineral lands" as used in this Statute is a technical term as defined by Blackstone; certainly it is as construed by the courts in the opinions and instances to which I have previously referred. Certainly in a popular sense guano, asphaltum, granite and lime stone are not minerals. In the ordinary use of the word "mineral", the widest possible sig- [523] nificance includes only the precious minerals, or, at most, all metalliferous substances. Possibly it might be conceded that coal and iron would be popularly included, but I think that beyond that the phrase "mineral lands" has to be construed within the principle stated by Blackstone in the foregoing quotation. Of course, the words "agricultural lands" in their popular sense include all sorts of land that are capable of tillage, or that are capable of being reduced to tillage although in their native state they are untillable. Nobody doubts, I should suppose, that the vast areas of the original hardwood forests of Ohio, Indiana and Kentucky, were agricultural lands in the popular sense, whether in a dictionary sense or not. I suppose that nobody ever thought that the stony and rocky hills of Vermont and New Hampshire were not, at the time of settlement, or are not now, agri-

cultural lands. In popular speech we speak of excellent agricultural land, of poor agricultural land, and sometimes of fair agricultural land. Like almost every other thing in nature, it has its degrees. Perfect agricultural land is seldom found. It ranges all the way from the very poorest and most stubborn, yielding scarcely an existence to the cultivator, to the rich farming land of the Mississippi Valley, where the slightest effort of the husbandman is returned many fold.

I am particularly impressed by the rule indicated by Blackstone, that an interpretation leading to an absurdity should be avoided. It is a strange thing in the history of law, as in the history of other human institutions, how often, after the lapse of centuries, the same questions repeat themselves and the same doctrines must be re-applied. No possible enlargement upon the subject of the principles just quoted from Blackstone could [524] equal the review of the whole subject by Mr. Justice Brewer in Church of the Holy Trinity v. United States, 143 U. S. 457, where, after pointing out that the transaction was strictly within the terms of the statute, as ruled by the court below, it was held that a contract by Trinity Church in New York City with an alien residing in England, for the latter to enter into the service of the church as rector and pastor, was not within the meaning of the statute making it unlawful

> "for any person, company, partnership, or corporation, in any manner whatsoever, to pre-

> pay the transportation, or in any way assist or encourage the importation or migration of any alien or aliens, any foreigner or foreigners, into the United States, its Territories, or the District of Columbia, under contract or agreement, parol or special, express or implied, made previous to the importation or migration of such alien or aliens, foreigner or foreigners, to perform labor or service of any kind in the United States, its Territories, or the District of Columbia."

There will be found practically every case that is accustomed to be used in illustration of this subject. When I first came to the consideration of this question months ago, I thought I must give some meaning to the word "agricultural" that brought it within its literal or popular understanding; that whether it was used as a word of classification or not, it was yet, if not strictly used as a word of definition, intended to restrain and to limit the kinds of lands that might be taken. Upon reflection, however, and after much thought and consideration of the arguments and of all the illustrative cases put to me by counsel, I have come to the confirmed opinion that within the doctrines of construction there stated it must be deemed purely a term of classification. Briefly put, why should Congress restrain the railroad from making up its mineral losses in the barren and unproductive mountain regions where they occurred, and require it to go into the rich [525] farming lands of Wisconsin, Minnesota, Da-

kota and central Washington. What purpose of object could be subserved by that, except to deplete the valuable lands that would otherwise be left open to settlers and to preserve what to that Congress were lands utterly valueless. I think such a construction leads to an absurdity. To borrow a suggestion from Mr. Justice Brewer in the Trinity Church case, I think that if the question had been put up to Congress, if somebody had proposed an amendment to the act saying that no worthless land should take the place of these mineral losses, that no barren mountain tops should be taken instead of them, but that the railroad should be confined in the selection of lands in lieu of mineral losses to strictly agricultural farming lands, he would have found not one voice or vote in support of the motion. I think it too clear for argument that any senator or Congressman to whom the proposition might have been put in that July of 1864, that the phrase forbid the railroad to take worthless land and required it to accept only what, to the mind of the Congressmen of that day meant the most valuable lands, would have repudiated it and hastened to offer an amendment to make it clear. The whole thing seems to me grotesque in its conception. I can but wonder if counsel can seriously consider that if, in 1876, and in 1880, and even in 1890, the railroad had proposed to take this sort of lands, the government would have said, "No, we want to keep the barren mountain tops, rocky hill sides and stunted forest growths; you may not choose them, for the statute

forbids; you must go to Wisconsin, Minnesota, North Dakota and central Washington, and hunt out unoccupied rich farming lands, and from these lands satisfy those losses." And now I am asked to rule that what it is certain no Senator or Representative would have voted for, is what they all meant by the [526] phrase. Of course it is equally absurd to suppose that the company would have proposed any such thing.

It was known to that Congress, as it is known to us, that with the possible exception of coal and iron the mineral lands would be found west of the Missouri River. It was in that portion of the road that the mineral loss would occur. It was known that the same character of land, the same topography, as existed in the place limits, existed in the indemnity limits opposite them. There was no difference in these respects between place and indemnity lands. Now to my mind it is utterly preposterous to assume that Congress seriously intended that the losses must be lifted out of their natural surroundings and carried eastward to the vast agricultural stretches then, as now, known to lay along the line of the road. Can any one suggest any plausible, or even any possible, reason for such an intention?

I have already called attention to the purpose of the act to open up the country so that the returning soldiers might go there to find homes. Now I am asked to assume, because of the literal phrase, that, in the teeth of that purpose Congress intended to deplete the lands which could serve that purpose

and to keep lands where by no possibility could these men seek habitation. The whole thing so offends my every notion of statutory construction, so offends every possible historical purpose, that I cannot for one moment entertain the thought.

Shank v. Aumiller, in the Western District of Washington, by Judge Neterer (1914) 217 Fed. 969, is an illustration of the interpretation of a statute as using the words "agricultural" and "mineral" in opposition. An act of August 30, 1890, limited the aggregate of entries by any one person upon the public lands [527] to 320 acres. The following year Congress, in effect, added a proviso that the act should be construed as pertaining only to agricultural lands, and not to mineral lands. Shenk had theretofore acquired 320 acres under the desert land law, and sought to file on additional land. The court held that the words "agricultural lands" were used only in contradistinction to mineral lands.

As pointed out by the company, the 5,120 acres involved in the Forest Reserve case were selections in what is now the Gallatin National Forest, on mineral losses. The government's testimony shows that not one acre of the Gallatin National Forest is agricultural within its definition. Hence, though the selections in the Forest Reserve case involved the identical question now presented, it was not raised. Nevertheless, Mr. Justice Van Devanter, in writing the opinion, made a statement which, in the light of the present contention of the government, is startling. In stating the terms of the grant he said (256 U. S. 51, 59):

> "As indemnity for any lands so excepted, as also for any excluded as mineral, other lands were to be 'selected by said company,' under the direction of the Secretary of the Interior, from unoccupied, unappropriated, nonmineral lands in odd-numbered sections within prescribed indemnity limits."

Thus he interpreted the word agricultural, in the very proviso under consideration, and in an identical situation, as meaning nonmineral.

The United States introduces its discussion of the subject with these words:

> "This issue is squarely presented for the first time in this court."

To my mind that itself is almost a conclusive answer to the argument. Without attaching undue importance to the language of Mr. Justice Van Devanter, and treating this issue as one of [528] first impression, yet the question was inherent in every mineral selection made by the Northern Pacific from the inception of these grants down to the present time, as well as in every mineral selection under at least two other grants having identical mineral indemnity provisions, that of July 27, 1866, to the Atlantic & Pacific and the Southern Pacific, and that of March 3, 1871, to the Texas & Pacific. After nearly three-quarters of a century this question is now raised for the first time.

If, in the Forest Reserve case, the Attorney-General's office, the Land Office, the railway com-

pany, or the Court, had considered that the lands then sought to be selected could not be taken on mineral base because non-agricultural, there would have been no necessity to go to any other question. Now I am asked to rule that I should go back to the uniform ruling of the Land Office, back of the Forest Reserve case, and hold that the railway company through guile concealed this question, and that through indolence and overwork, all departments of the government failed to apprehend it.

In what I have said above I have had in mind the several rules of construction stated by Blackstone, but have not attempted to separately apply them. They run in this case, as in most others, into one another. Thus the spirit, purpose, results, the condition of the country, the situation of our people which called for the railroad and the grants, all point to one meaning of the phrase and make absurd to my mind the literal meaning tendered by counsel through dictionary definitions.

I conclude that the mineral indemnity selections listed in N. P. exhibits 144 and 146 may be made in any lands which are non-mineral, non-coal and non-iron. I believe that the testimony [529] is undisputed that the lands in the first and mineral indemnity limits to which these selections are directed are of that character. I am, of course, not attempting now to determine whether they are available for selection as against other objections, presently to be discussed. I further conclude that the substitution selections upon mineral losses proposed by

N. P. exhibit 145 are not to be defeated by want of proof that the lands sought to be supported are agricultural in the literal sense. They were ascertained to be non-mineral when the original selections were made, and that is sufficient. The question as to their non-coal and non-iron character will be considered in the discussion of the substitution issue.

V. Lands in Absaroka and Beartooth Forests. 314,544.05 acres.

These lands lie within the place limits in Montana. They were lost to the grant by reason of the existence of the Crow Indian Reservation, the reservation having been created by treaty of May 7, 1868, and the road not having been definitely located through it until June 27, 1881. Indemnity was had for the loss. Afterward, April 11, 1882, Congress ratified an agreement with the individuals and heads of families of the Crow tribe whereby the Indians agreed to sell certain reservation lands, including those in dispute, to the Government of the United States, it agreeing, in consideration thereof, to pay to the Indians $30,000.00 per year for 25 years in addition to the expense of survey of the remaining lands and certain other sums. While the rule announced by Attorney-General Wickersham in 1912, found in 41 L. D. 571 (see also pp. 574-583) evidently would have authorized the company to select such of the restored land as were surveyed, in satisfaction of mineral [530] losses, it did not attempt to do so, and the United States, by successive withdrawals in the years 1902 to 1909 inclusive, put the

lands in controversy partly in the Absaroka, and partly in the Beartooth, national forests.

The Attorney-General, at the citation just given, advised the Secretary of the Interior that place lands lost to the grant and afterward restored to the public domain were subject to selection for mineral losses, as being, at the time of selection, unoccupied and unappropriated lands within fifty miles of the road, and the Department thereafter administered the grant in accordance with that advice. The government does not appear to contend that the opinion and practice are erroneous. It implies that if the company had got about to select the lands before Congress reappropriated them for the national forests, it could have obtained them as indemnity. The government calls attention to adjoining Crow lands which were restored for disposal to actual settlers only and to which the company abandoned its claims, the point of the distinction being that since the government could restore upon such condition that the company could not select, the company could not complain if a gratuitous unconditional restoration were thereafter revoked.

The company relies upon the opinion of the Attorney-General. It excuses its omission to select the lands by explaining that the withdrawals occurred before the opinion and the consequent practice permitting mineral indemnity selections in place limits. It also says, which I accept as a fact, that the government has patented to the railway as mineral indemnity 60,000 acres of restored Crow lands,

which were not put into reserves. Incidentally the railway has selections pending for 4,390.47 acres of lands in similar situation. [531]

The government has made no question about restored Crow lands and other restorations to the place limits patented to the company. It has not asked for reconveyance nor compensation. I assume that any such patented lands would in any case fall within the rule applied to other lands erroneously patented, and should be charged to the company, the grant being deficient and no lands being tendered in their stead. That rule was conceded as to the lateral and terminal errors and the Greater Sioux lands. The government does not seem to be contending that the company is not entitled to patents upon its pending selections.

The whole question will turn upon what the phrase "and within fifty miles thereof" means. Does it include the forty-mile place limits of the grant, or does it mean only the ten-mile indemnity strip created for other losses so that for mineral losses the company could go to the same strip to which it went for other losses, and not elsewhere? The first thing that strikes one when he comes to consider this question is: What lands within the forty-mile limits could have been taken? By the very terms of the statute they had to be unoccupied, unappropriated, odd-numbered sections; but those very lands passed by the grant, and, therefore, there was nothing left, apparently, from which a selection could be made to satisfy mineral losses. If

these words are held to apply to the forty-mile place limits then it follows of necessity that Congress intended that lands which, for one reason or another were restored to place limits might be selected in satisfaction of mineral losses. Congress doubtless appreciated that it might be many years before mineral losses in place would be known, and that, in the course of those years, many restorations to the place limits would be made—homesteads which had been abandoned, or which for [532] some legal reason the settler had failed to get under his claim; lands reserved and held by the government for some purpose, and restored to the public domain when the purpose had been accomplished; in short, all sorts of restorations to place limits.

I say frankly I should have been inclined to hold that this construction of the provision was rather fanciful, and I should not have been inclined to adopt it, except for the opinion of Mr. Wickersham. I should not be willing to set up my own judgment in opposition to the opinion of so great a lawyer. However, that this construction must be adopted is plain from a consideration of the grant to the Southern Pacific of date July 27, 1866, precisely two years after this grant was made. There the act contains, ipsissimis verbis, the mineral indemnity provision of the Northern Pacific grant, except that in that case it was confined to the place limits, that is, twenty miles on each side of the line of the road. Now, obviously, therefore, Congress intended in 1866, by that language that indemnity might be se-

lected from restored lands, because there were no other lands out of which possibly any selections could have been made. If, therefore, that was the Congressional intention, as it plainly was under the Act of July 27, 1866, there is no difficulty in understanding that the same precise provisions extending ten miles beyond the place limits should receive the same interpretation. I can see no possible answer to this. Of course, when the government reacquired these lands from the Crow Indians, it might have limited them to a special purpose, and held them only for that purpose, in which event I should think they would not fall within the above reasoning; but, as a matter of fact, the lands were restored to the public domain without limitation. They then became a part of the indemnity limits for mineral losses, and sub- [533] ject to selection therefor. I think, too, that the opinion of Mr. Justice Holmes, speaking for the Supreme Court in the case of United States v. Southern Pacific Railroad Company, 223 U. S. 565, declares precisely the foregoing principles. There the lands in dispute were within the indemnity limits of the grant to the Southern Pacific, and within the place limits of the grant to the Atlantic & Pacific by the same act. The Atlantic & Pacific grant was forfeited. Patents were issued to the Southern Pacific on indemnity selections and the United States brought suit to cancel them and for an accounting, arguing that since the lands lay within the place limits of the Atlantic & Pacific they could not have been contemplated as possibly falling

into the indemnity limits of the other road. The Circuit Court and the Circuit Court of Appeals held that the state of the lands at the time of selection determined the right. The Supreme Court affirmed, saying (p. 570):

> "An indemnity grant, like the residuary clause in a will, contemplates the uncertain and looks to the future. What a railroad is to be indemnified for may be fixed as of the moment of the grant, but what it may elect when its right to indemnity is determined depends on the state of the lands selected at the moment of choice. Of course the railroad is limited in choosing by the terms of the indemnity grant, but the so-called grant is rather to be described as a power. Ordinarily no color or title is gained until the power is exercised. When it is exercised in satisfaction of a meritorious claim which the government created upon valuable consideration, and which it must be taken to have intended to satisfy (so far as it may be satisfied within the territorial limits laid down), it seems to us that lands within those limits should not be excluded simply because in a different event they would have been subject to a paramount claim. It seems to us, in short, that Ryan v. Central Pacific Railroad Company, supra, should be taken to establish a general principle and should not be limited to its special facts."

Ryan v. Central Pacific Railroad Company, 99 U. S. 382, had applied the same doctrine to indemnity lands which at the time of the grant were subject to a claim under a Mexican grant. It was [534] held that upon the later extinguishment of that claim, the lands were subject to selection as indemnity for losses in the primary limits of the railroad grant.

Thence it follows that the Absaroka and Beartooth lands became subject to selection when they ceased to be a part of the Crow Indian Reservation, and are as much within the rule of the Forest Reserve case as any other indemnity lands.

VI. Lands formerly in Fort Ellis Military Reservation, 3,300.82 acres.

Fort Ellis was created prior to definite location of the railroad. It lay within the place limits, so that the lands were lost to the grant; and indemnity was had for them. The fort was abandoned in 1886 under the Act of July 5, 1884, 23 Stat. 103, entitled "An act to provide for the disposal of abandoned and useless military reservations," providing for the survey, sale and appraisement of the lands within any military reservation which might become useless for military purposes. Later, by Act of February 13, 1891, 26 Stat. 747, entitled "An act to provide for the disposal of the abandoned Fort Ellis military reservation in Montana, under the homestead law, and for other purposes," Congress granted one section to the State of Montana for a

militia camp-ground and authorized the State to make certain other selections, and further provided:

> "That if any portion of said reservation shall remain unselected by said State for a period of one year after the approval of the survey, that portion remaining unselected shall be subject to entry under the general land and mining laws of the United States."

It is obvious that these restored lands will be governed by the principle applied to the Absaroka and Beartooth lands, unless taken out of that principle by the proviso just quoted. [535]

The government contends that lands which Congress has made "subject to entry under the general land and mining laws" may not be selected under the Northern Pacific granting act, it being a special statute.

The company emphasizes that under the mineral proviso indemnity may be taken from unoccupied and unappropriated odd-numbered sections within fifty miles of the line of the road. It contends that at the date of withdrawal the lands were unoccupied and unappropriated, and interprets the Act of February 13, 1891, as meaning that the lands should be subject to disposal under the laws relating to both non-mineral and mineral land. It states that 80 acres were selected by the company under one of the lieu acts and that 160 acres classified as mineral were selected and patented to the company under the same act. It states that the Secretary caused these

lands to be classified under the mineral classification act, and that in general the Secretary treated the land as part of the unrestricted public domain.

The statute under which the Fort Ellis Reservation was abandoned was evidently not a restoration to such status that the lands might have been selected. It permitted only survey, appraisement and sale. The later statute authorized only "entry" under the general land and mining laws. While the Northern Pacific granting act was a public land law, as well as a contract relating to the public lands, it was not a general land law, but a special one. "Entry" is a technical word relating to the procedure whereby persons may initiate rights to lands within the public domain. It does not comprehend the other technical term "selection". Having regard to the fundamental rule that the grant must be strictly construed in favor of the sovereign, I must hold, [536] notwithstanding such practice as the Land Office may have followed with respect to them, that the Fort Ellis lands are not subject to selection.

VII. Lands in Northern Cheyenne Indian Reservation, 52,052.93 acres.

Unlike the lands under the last two headings, these are not lands restored to place limits. They lie in first and second indemnity limits. After definite location of the road they were placed, by executive orders, in the Indian Reservation. The action of the government in thus undertaking to deplete the in-

demnity limits raises the same question as that pertaining to withdrawals for national forests and other governmental purposes, and will be discussed as part of the general discussion of that subject, unless removed from it by the special points now made by the government.

Until 1926 all of the lands within the reservation including those lying within the company's indemnity limits were kept in tribal status. In that year Congress declared the reservation to be the property of the Indians, and authorized the Secretary of the Interior to prepare a roll of the Northern Cheyenne Indians then living and to allot in severalty lands classified as agricultural and grazing to the enrolled Indians in tracts not exceeding 160 acres. 1547 allotments were made in 1932.

The government contends that no compensation should be awarded to the company for these lands, because, first, an Indian reservation is not a "Government reservation" within the meaning of the act of June 25, 1929, under which this suit is brought, providing that indemnity lands within the boundaries of any national forest or other government reservations are taken out of the operation of the grant and retained by the United States, and that the company [537] have compensation therefor; and, second, there is no evidence that the lands are unappropriated and unoccupied. The company, on the other hand, maintains, first, that the Indian tribes are wards of the government; that an Indian Reservation is a public use; that the government re-

tains the power of disposal; and that such a withdrawal is within the meaning of the 1929 statute; and, second, that the lands were unoccupied and unappropriated at the time they were withdrawn and set apart for reservation purposes.

I am not inclined to give the term "Government reservation" in the 1929 act, a limited meaning. As I have heretofore said, it is the evident purpose of that act to determine all controversies and have a full accounting. It would be very unfortunate if by reason of some narrowness of expression or interpretation all other questions should be settled, and the question of compensation for all other lands determined, except the railway's claim to this particular area.

I do not believe, however, that the expression requires any construction. The Indians are the wards of the government. In providing for them the United States is exercising its sovereign authority, and hence a reservation for Indians is as much a government reservation as is one for military purposes, and is clearly within the subsequent phrase of the statute, "governmental purposes."

Counsel show that a considerable portion of the reservation lands had been allotted to individual Indians. There is no proof, however, that any of the allotments was of any portion of the specific lands in controversy, nor is it shown that the allotted tracts have been patented or that they are free from ultimate disposition by the government. I think, however, that, [538] even if those things were

shown, yet the reservation in which the allotments occurred would still be a government reservation, because it would be under the police and control of the government. As an analogy, moneys, individual and tribal, owed the Superintendent of an Indian reservation, constitutes a debt due the United States. Bramwell v. United States Fidelity & Guaranty Company, 269 U. S. 483.

Finally, I do not think that the condition at this time governs either as to whether the reservation was governmental within the 1929 act or as to whether the lands are to be considered as unoccupied and unappropriated. Rather, their status when withdrawn governs. If the company is entitled to select the lands now and to have compensation for them, it is because they were taken out of the indemnity limits and appropriated by the United States, at a time when the railway had a right to look to them for indemnity. That it afterward conveyed the lands away, or peopled them with Indians, or did anything else with them that the company could not prevent, should not improve its position nor weaken that of the company, any more than the rights of the railway to compensation for lands in the forest reserves should be held to be defeated by any action of the government in permitting homestead entries therein, or in making any other disposal of the lands which it has withdrawn for its purposes. The lands were all unsurveyed at the time of their withdrawal, so that the company could not have selected them. The fact that the government

withdrew them negatives the idea that they were occupied or appropriated under some other claim.

I conclude that the Northern Cheyenne lands fall in for consideration with the other withdrawn lands.

[539]

The net result of my rulings upon the Absaroka and Beartooth, Fort Ellis, and Northern Cheyenne lands is to remove from possible selection by the railway company, in satisfaction of its unused losses, only the 3,300.82 acres of Fort Ellis lands. As will hereafter appear, other lands remaining in the forest reserves exceed the ascertained deficiency, so that so far as quantity alone is concerned, the withholding of the Fort Ellis lands has no practical effect.

VIII. Substitution of Losses.

N. P. exhibit 138, revised, discloses the company's proposal for substitution of base or re-arrangement of losses. Having selected indemnity on certain specific losses, it asks that it be permitted to assign other losses to support these selections and to have back for use elsewhere the losses originally assigned. The several items involved are as follows:

Having used 786.98 acres of Minnesota subsequent losses in first indemnity limits it asks leave to substitute prior and mineral losses in order that it may have the subsequent losses to use in Minnesota second indemnity limits. The second item is the reverse; it is a proposed substitution of 1,019.36 acres of subsequent losses to make good an assumed error

in the selection of lands in second indemnity limits on prior losses. I have held that prior losses may be used in second indemnity to the extent of and subject to the conditions stated in the resolution, and hence these two items of substitution are unnecessary and need not be further examined.

The next three entries represent rearrangements on account of correction of lateral limits in Montana and Idaho. Re- [640] drawing the limits threw some lands formerly in first indemnity limits into second; hence it was assumed that subsequent losses should be assigned in lieu of prior and mineral losses originally used. But, as I have said, I do not consider any substitution necessary, though care should be observed lest lands in second indemnity be taken beyond the quantity of subsequent losses. The company claimed credit for "taking the bitter with the sweet" in thus offering to give up some of its meager stock of subsequent losses in exchange for mineral losses, of which it has an abundance. Plaintiff insisted that the defendant was endeavoring to get credit which it did not deserve, because by succeeding items it again furnished mineral losses in an amount sufficient to get back the subsequent losses just given up; and plaintiff called this process "re-substitution". It is evident that the company was proposing only to supply, in the aggregate, enough mineral losses to release the desired measure of subsequent losses, including those offered upon the lateral corrections. I find nothing about it either to praise or to blame.

The next two items, 602,810.73 and 194,617.32 acres, are the significant ones. They represent the company's proposal to supply Montana and Idaho prior and mineral losses in lieu of subsequent losses formerly used in first indemnity limits. Prior and mineral are classed together, but the great preponderance is mineral.

The reason for the proposal to make the substitution or rearrangement is as follows: there are large quantities of second indemnity lands in Montana and Idaho which cannot be taken on mineral base because they are beyond the fifty mile limit. The company has relatively small quantities of unused general losses, but has, as said above, an abundance of unused mineral losses. Many years ago it used quantities of subsequent losses in first indemnity limits [641] all along the line, where it might have used, or might now use, mineral losses. Hence it asks leave to substitute by putting its mineral losses there now, and having back its subsequent losses to use out in the sixty mile belt.

The remaining three items represent other occasions for substitution. The purpose of the first is to put mineral losses instead of subsequent losses in a situation where land was withdrawn for a military reservation after the date of the grant and before definite location, the loss being treated as a subsequent loss, and where later that land was ascertained to be mineral, constituting it a mineral loss, the company wishing return of its subsequent losses on its substituting mineral. The last two items

represent the supplying of prior or mineral losses in lieu of losses suffered under the grant of 1870 and mistakenly used to select lands in the grant of 1864. The government has indicated no objection to these incidental substitutions.

The discussion will therefore pertain to the proposed use of mineral losses to release subsequent losses, represented by the two large items mentioned above. The request is a most important one, for unless it be allowed the company will have left about 800,000 acres of unused and unusable mineral base, and will, to that extent, not be able, all other questions aside, to satisfy the deficiency in its grant.

On occasion the Land Office has permitted rearrangement of losses, as where the selection list was still pending, or where it had itself induced an error. Its attitude is indicated by two decisions:

In Northern Pacific Ry. Co. (March 26, 1908) 36 L. D. 328 the company had offered prior losses for selection of second indem- [642] nity lands, and the selections had been held for cancellation. On motion for review the company claimed either that the selections should be granted on the prior losses or that it should be permitted to substitute subsequent base formerly used in first indemnity limits, supplying prior losses in lieu of the base so taken. First Assistant Secretary Pierce held that the resolution of 1870 excluded the use of prior losses in the selection of lands in the second indemnity belt, but said (p. 331):

"There is, however, merit in the argument that the company having used losses in support of selections in first indemnity limits, which if free might be used in support of selections in second indemnity limits, and there being other unsatisfied losses available for first indemnity selections, the Department should release those bases formerly used upon the substitution of other unsatisfied bases and permit the released bases to be used in support of the second indemnity selections here in question. This will be done subject to the limitations suggested in your office letter of September 5, 1907, above quoted (suggesting that protection be afforded to intervening homesteaders and timber and stone entrants.) All rights initiated upon these lands under any of the public land laws at a time when they were freed from the pending selections and subject to appropriation, will be protected, but otherwise the company will be permitted to proffer substitute bases for the consideration of your office."

Later, in Northern Pacific Ry. Co., (July 27, 1915) 44 L. D. 218, the company applied to substitute certain mineral losses for a like quantity of first indemnity lands. The sequence of events was as follows: for certain North Dakota first indemnity selections the company designated as base a list of place losses between Superior and Ashland, Wisconsin, within the Portage conflict. The Department

held (Nov. 13, 1895) that the grant did not extend east of Duluth, and gave the company 60 days within which to designate new base. The company designated second indemnity lands in the Crow Indian Reservation, Montana, and upon that base the North Dakota indemnity selections were patented. [643] Subsequently, the Supreme Court held that the company's grant extended east to Ashland. The company thereupon requested that the Wisconsin base be reinstated and the Crow base released, upon the ground that the grant in Montana was deficient and that the Wisconsin losses did not afford valid base for second indemnity selections in Montana, while the Crow losses did. This request was granted "in order that the company might not be prejudiced" by the Department's decision of Nov. 13, 1895, which the Supreme Court had held to be erroneous. The company then asked to further substitute mineral base for the Wisconsin base, because, in part, the latter could be used for coal and iron lands, while the mineral losses could not. In support of this further request the company cited 36 L. D. 328. First Assistant Secretary Jones, denying the request, said (p. 219):

> "It will be observed, however, that in that case the selection was unpatented and the proffered substitute bases were of similar character to the original bases. In the case here under consideration, the list has been patented without inquiry as to the coal or iron character of the lands, and if the mineral bases were allowed to

be substituted, as now requested, it would be necessary to have an examination made to determine whether the selected tracts contain coal or iron. This would virtually mean the reopening of a case where the selected tracts were correctly patented years ago and an examination by the Government of lands which have passed beyond the jurisdiction and control of the land department. Manifestly such an examination is unwarranted and cannot be authorized."

It is clear from the foregoing that the Secretary of the Interior regarded the substitution of base as something to be allowed or rejected in the course of due administration of the grant. For such reasons as appealed to him as sufficient, he permitted substitution. In other cases, for like reasons, he denied it. There was no question in the Land Department, at any time, of its authority in administering the grant, to permit or to deny substitution [644] in the interest of justice. I think this view of the Secretary's powers is correct. As the submission of base was a mere matter of orderly administration, I can see no reason why the regulations prescribed by the Secretary might not be altered or bent to suit the situation, and to do justice between the United States and the company. When the evidence on this subject was offered, I expressed the view that the authority of this court did not extend to administrative methods, but that the grant came here under the act of 1929, as it stood at that date, and that the

review of the previous administration of the grant was limited to the correction of errors in law or fact. I now think that I was partially in error in the impression I then had. Were the grant now committed to the Secretary for adjustment, as it had been before the act of 1929, I am quite clear that his power to revise all administrative steps, for good reason, could not be doubted. I think that it would be his duty to adjust the grant so as to do justice between the parties, and, if necessary, to permit substitution of base, or any sort of reassignment of losses and selections of indemnity, that would conduce to that end. Of course, he should act with sound administrative discretion, not arbitrarily nor capriciously, but on reasons which appealed to his administrative judgment as sufficient. I am now of the opinion, therefore, that such adjustment of the grant is committed to this court, with the same power and authority possessed by the Secretary under the previous statute directing him to adjust. The only difference is that the secretary should have acted, and doubtless would have acted, with a sound administrative discretion, while the court can act, and should act, only in accordance with sound judicial discretion, meaning, of course, a discretion in the application of established [645] practices and principles of equity. With that single difference, I think that this court is invested with authority to so adjust this grant as to do equity between the United States and the company, and that, wherever, for the purpose, reassignment of base is necessary, this court

may allow it if no equitable principles stand in the way. What I mean to say is that so far as concerns the subject per se, this court now has authority to deal with it judicially as fully and completely as, under previous statutes, the Secretary was authorized to deal with it administratively. The only question, therefore, remaining is whether or not this court should, in the exercise of sound judicial discretion, and in accordance with recognized principles of equity, allow or refuse the request.

Now primarily, and at the base of this discussion, lies this broad principle of equity, that the United States is presumed to intend to gratify its grant to the company, if it may do so. The applicable maxim is, "Equity imputes an intention to fulfill an obligation", and its general purport is stated by Mr. Pomeroy in Pomeroy's Equity, Sec. 420 (3rd Ed.):

> "This principle is the statement of a general presumption upon which a court of equity acts. It means that wherever a duty rests upon an individual, in the absence of all evidence to the contrary, it shall be presumed that he intended to do right, rather than wrong; to act conscientiously, rather than with bad faith; to perform his duty rather than to violate it."

Primarily, the foundation equity in this case is that the grant ought to be satisfied if it can be done without violence to established principles, or without injustice to the United States, so that if there were no reasons for allowing or refusing the substitution,

other than those inhering in the application itself, I should think it ought to be allowed, for in no [646] other way can the government fulfill its obligation.

Next applies the maxim, "He who seeks equity must do equity." Substitution may be required under that principle without further refinement. Looking at the question at large as it now stands, it is within the sound judicial discretion of this court to permit this change upon the broad general principle that the court will require the plaintiff to do equity. No wrong is done to anyone; the United States is not disadvantaged in anywise except in having to carry out its agreement with the company; and as this is a final adjustment of the grant and as the Secretary, if he were adjusting, might within his administrative discretion permit the substitution, so this court, within its judicial discretion and in conformity with the principles of equity, might, and under all the circumstances of the case I hold should, permit it.

If, however, a specific head of equity be required to support the substitution, it may be found. Here, in brief, is the case:

When the Act of 1864 was passed the Statutes at Large were printed by Little & Brown under a contract with the United States, and not by the Government Printing Office, as now. However, each volume contained a reference to the act of Congress reciting that the edition had been "CAREFULLY COLLATED AND COMPARED WITH THE ORIGINAL ROLLS IN THE ARCHIVES OF THE

GOVERNMENT under the inspection and supervision of the ATTORNEY-GENERAL OF THE UNITED STATES, as duly certified by that officer", and that the laws so published should be competent evidence of the several public and private acts of Congress in the courts and in all the tribunals and public offices of the United States without [647] further proof or authentication. The grant of 1864 appears in 13 Stat. 365. There the mineral indemnity provision reads as follows:

> "That all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd-numbered sections, nearest to the line of said road may be selected as above provided:"

The words "and within fifty miles thereof" are omitted.

For something over forty years all concerned understood the published statute to be as enacted and enrolled.

In 1904 the company filed a selection list in the Helena Land Office for some 3,000 acres of land in the second indemnity belt, assigning as base a corresponding area of mineral losses. The Commissioner of the General Land Office referred the list to the Secretary of the Interior for advice. While the matter was pending, the company's land attorney, Mr. Mason, in reading the debates in Congress, inferred that the act might have been incor-

rectly printed. He asked the company's attorneys in Washington to consult the enrolled bill, and thus the error was disclosed. The Secretary of the Interior was notified, and the company substituted general losses in support of its selections. The error in quoting the statute occurs both in the statement of the case and in the opinion of the court in Barden v. Northern Pacific Railroad Company, 154 U. S. 288, decided in 1894. Even after the error was discovered and communicated to the Commissioner, the officers of the Department of the Interior continued to quote the act as published. Assistant Secretary Ryan did so August 30, 1905, in 34 L. D. 105, and Secretary Ballinger October 24, 1910, in 39 L. D. 314. As late as December 12, 1911, in 41 L. D. [648] 576, Assistant Attorney-General Cobb referred to the discovery as "recent", saying:

> "The words underscored 'AND WITHIN FIFTY MILES THEREOF,' do not appear in the law as published in the Statutes at Large, recent discovery of the omission being responsible for one of the questions in the present controversy, * * *."

Attorney-General Wickersham's reference to the error, in 41 L. D. 572, follows. Not until then does the mistake appear to have been fully apprehended by the officers charged with the administration of the grant.

It is true that Mr. Schwarm testified that in the very early days the company had a correct copy of the statute, as enacted, in its possession. At that

time, however, the question could not have come up, or been of any importance, because then, and for long after, there were no ascertained mineral losses; and, as the years went by, those having to do with the grant left the employ of the company, and are all now dead. So through all the time with which we are here concerned it is apparent, without dispute, that both the railroad and the Land Office and the Attorney-General's office, indeed the courts of the United States, regarded the statute as correctly printed, and all were unconscious of the error. In the very nature of things, no one desiring to consult the statute would have dug up from the file a loose copy; but naturally, and I might almost say of necessity, the officials of the railway would, as did the court and the men in the Land Office, pick up the volume of the Statutes at Large and look at the act as there printed.

In my own office, for years, we have received copies of the various statutes as passed by the legislatures. They are looked through first to see whether there are any emergency meas- [649] ures, and to get a cursory view of the laws with which we must conform when they go into effect. They are loosely filed in some appropriate place in the office, and when the publishd volumes are printed and received, no further reference is made to those loose leaves. There is neither necessity nor reason for it. It would be a most preposterous idea that, because in one of the loose leaf advance sheets the statute was correctly printed and showed the terms of the

law as passed, and in the published volume some word or phrase was left out, we should be charged with notice of the error. I should say that such an idea would never be put forward except in the exigencies of a lawsuit. Of course, what form the copy Mr. Swarm refers to was in, where it was kept, what, if any, use was made of it at the time, is not disclosed by the evidence and after all the years could not possibly be shown; but it appears to me so plain that, after the printed volume was received, everyone desiring to consult the statute disregarded, and in time came to forget, the copy, and to rely upon the printed text, and it only, that I think there is no room for even a doubt upon the subject.

The fact of this mistake being undisputed, a second question is whether it may be said upon this record that it influenced the company in making its original assignments of losses and selections of indemnity. In the nature of things, of course, no direct evidence can be had, as there is no person living who could know the fact; but I should say that the influence may be fairly and reasonably inferred. Men act in accordance with their interests, upon the facts as they understand them. The company used up its general losses within first indemnity; it did not assign its mineral losses. Now it is obvious that had the land depart- [650] ment of the railway understood that it could use its mineral losses only in first indemnity limits, while second indemnity limits were open to its general losses,

it would not have exhausted first indemnity, leaving itself nowhere to satisfy its mineral losses, present or prospective. It is a plain inference from the facts, it seems to me, that mineral losses were reserved to be assigned upon the theory that they might be used anywhere nearest the line of the road. I have no difficulty whatever in saying that it sufficiently appears from the testimony that the company did act to its prejudice in reliance upon the statute as printed, and that had the statute been correctly printed, or had the company's officers then known of the mistake, it would have acted differently. So we have then here a mutual mistake on the part of the officers of the land department of the United States, and the land department of the Northern Pacific as to the statute, and as to the consequent rights of the company and the United States under that statute, and a course of action to the detriment of the company.

The first objection is that this was a mistake of law. Obviously, for several reasons, the objection is not sound. In the first place, within the meaning of that phrase, the statute making this grant to the Northern Pacific is not a law. It is a private statute, and the error occurs in the granting section of that statute. It is true that these railroad granting acts are laws as well as grants, but they are laws only in the sense that they express the will of Congress and that the railroad company is bound by that will, and, when it accepts the grant, it accepts it as the Congress of the United States in-

tended. in no other sense is it a law. But even if by a stretch of speech it [651] could be called a law within the meaning of the doctrine that equity will not relieve against mutual mistakes of law, the result would not be at all altered.

The principle is thus declared in Pomeroy's Equity, Sec. 849 (3rd Ed.):

> "Sec. 849. RELIEF WHERE A PARTY IS MISTAKEN AS TO HIS OWN EXISTING LEGAL RIGHTS, INTERESTS, OR RELATIONS. Is it possible to formulate any general rule which shall be a criterion for all cases of relief from mistakes of law pure and simple, and without other incidental circumstances, which shall be sustained by judicial authority, and which shall furnish a PRINCIPLE as guide for future decisions? In my opinion, it is possible. It has been shown that where the general law of the land—the common JUS—is involved, a pure and simple mistake in any kind of transaction cannot be relieved. Also, where a person correctly apprehends his own legal rights, interests, and relations, a simple mistake as to the legal effect of a transaction into which he enters, in the absence of other determining incidents, is not ground for relief. There is, as shown in a former paragraph (Sec. 841), a third condition. A person may be ignorant or mistaken as to his own antecedent existing legal rights, interests, duties, liabilities, or other relations, while

he accurately understands the legal scope of a transaction into which he enters, and its legal effect upon his rights and liabilities. It will be found that the great majority, if not indeed all, of the well-considered decisions in which relief has been extended to mistakes pure and simple fall within this class; and also, that whenever cases of this kind have arisen, RELIEF HAS ALMOST ALWAYS BEEN GRANTED, although not always on this ground. Courts have felt the imperative demands of justice, and have aided the mistaken parties, although they have often assigned as the reason for doing so some inequitable conduct of the other party which they have inferred or assumed. The REAL REASON for this judicial tendency is obvious, although it has not always been assigned. A private legal right, title, estate, interest, duty or liability is always A VERY COMPLEX CONCEPTION. It necessarily depends so much upon conditions of fact, that it is difficult, if not impossible, to form a distinct notion of a private legal right, interest, or liability, separated from the facts in which it is involved and upon which it depends. Mistakes, therefore, of a person with respect to his own private legal rights and liabilities may be properly regarded,—as in great measure they really are,—and may be dealt with as mistakes of fact. Courts have constantly felt and acted upon this view, though not always avow-

edly. Lord Westbury openly declares that such misconceptions are truly mistakes of fact. Some very instructive remarks of Sir George Jessel, which I have placed [652] in the foot-note, will, with a slight modification of his language, apply to all instances involving this kind of error or ignorance. A general rule permitting the jurisdiction of equity to relieve from mistakes of the law pure and simple, in all cases belonging to this species, and confining its operation to them, would at once reduce to clearness, order, and certainty a subject which has hitherto been confessedly uncertain and confused. It would work justice, for these kinds of errors stand upon a different footing from all others, and justice and good conscience demand their relief; it would conform to sound principle, for these mistakes are in part essentially errors of fact; and finally, it would explain and harmonize many decisions of the ablest courts which have hitherto seemed almost inexplicable except by violent and unnatural assumptions. I therefore venture to formulate the following general rule as being eminently just and based on principle, and furnishing a simple criterion defining the extent of the jurisdiction. The number of decisions which support it, and which it explains, is very great. Wherever a person is ignorant or mistaken with respect to his own antecedent and existing private legal rights, interests, estates, duties, liabilities,

> or other relation, either of property or contract or personal STATUS, and enters into some transaction the legal scope and operation of which he correctly apprehends and understands, for the purpose of affecting such assumed rights, interests, or relations, or of carrying out such assumed duties or liabilities, equity will grant its relief, defensive or affirmative, treating the mistake as analogous to, if not identical with, a mistake of fact. It should be carefully observed that this rule has no application to cases of compromise, where doubts have arisen as to the rights of parties, and they have intentionally entered into an arrangement for the purpose of compromising and settling those doubts. Such compromises, whether involving mistakes of law or of fact, are governed by special considerations."

It is too plain for discussion that the mistake we are here considering comes flatly within the rule stated by Mr. Pomeroy. I shall not trouble the court with reference to cases at large. Mr. Pomeroy discusses the whole subject, commencing at Section 841, with footnotes and illustrative cases, and points out the limits of the doctrine one way and the other.

The next objection is that the company is charged with knowledge of its grant, and hence of the mistake. Obviously, [653] however, that cannot be so. If A and B enter into a contract, the terms of

which are all agreed upon, and it is turned over to a stenographer to be typewritten, and, through error and oversight of the stenographer, a material term of the agreement is omitted, and it is not noticed by the parties until years afterward, it would be subversive of all sense of equity and justice that both parties were bound to know what the stenographer had not written. The truth is that it would be a mistake of fact pure and simple, a mistake of the stenographer. So, likewise, it is elementary if the parties enter into a complete agreement, the terms of which they fully understand, and then turn it over to counsel to prepare an instrument to carry out those terms, and counsel, through error or oversight, or even through ignorance of the law, prepares an instrument which does not carry out the agreed terms, the mistake is not one of law by the parties, but one of fact by their counsel. But all this seems to me to be entirely apart from anything necessary to consider. Here was a statute of the United States. Here was a printed volume containing what purported to be that statute as enacted. The courts, the departments of the government, and all private persons were directed by Congress to rely upon that statute as there printed. Both the Department of the Interior and the railway company did rely upon it. Obviously this is so, indisputably so. To call it, under any circumstances, by any circumlocution of words, or refinement of reasoning, anything except a pure mistake of the printer upon which the parties relied, and

upon which they had a right to rely, is to overlook the essential nature of the error. What court, what private individual, what person having occasion to know the terms of a statute, whether it was a public statute or a private statute, would have ever thought of going [654] beyond the terms of the printed volume and examining the enrolled bill in the office of the Secretary of State? It seems to me that the question just put disposes of the whole subject.

Of course the ideal man would not make mistakes, the ideal printer would not misprint a statute; the ideal stenographer would not mistranscribe stenographic notes. The ideal man of affairs, whether of business or a profession, would be guilty of no oversights, no omissions. By that line of thought there would be no occasion for the equity head of relief from mistakes. The doctrine of relief from mistakes is predicated upon the frailty of human faculties. As applied here a common-sense view must be taken. The heads of departments, the whole clerical force of the General Land Office of the government, and the land department of a railroad having forty million acres of land under its supervision all proceeded ordinarily and naturally as men would in their own individual affairs, and so proceeding they accepted the statute as printed, without investigation and without further thought, which they had a perfect right to do.

It is insisted, however, that the company had means of knowledge. In the first place, as said above, it once had a copy. In the next place, it is

inferred, if not said, that it might have gone to the Secretary of State's office and examined the enrolled bill. Well, for that matter, so might the government. The government had precisely the same means of knowledge that the company had, no more, no less. The mistake was the mistake of an agent employed by the United States, and it seems to me it would be the grossest inequity to say that that mistake cannot be corrected because the company might have found out that the mistake had been made. [655]

It is insisted too, that the defendant has been guilty of laches in that it did not seek earlier relief after the error was discovered. It is difficult for me to see what it could have done other than what it did do. In 1910 it made application to substitute mineral losses for Bismarck lists 54 and 56, involving 11,360 acres and 9,880 acres respectively. Apparently at or about the time these applications were filed, a similar application had been made upon Fargo list 14, for 23,467.88 acres, as action upon the Bismarck lists was deferred pending decision upon the Fargo list. That decision is the one reported in 44 L. D. 218, cited above, denying the substitution. The subject evidently remained under advisement in the Department for five years. Some of the mineral base then offered and rejected is being offered now in the defendant's request for substitution. Having tried and failed, I do not see what more the company could have done. I can think of no form of legal action that might have

been invoked to give to the company any relief from the predicament in which it found itself from this printed error. It is too plain to discuss that it could not have sued the Secretary of the Interior, as that would have been equivalent to suing the United States. It is equally plain that mandamus would not lie against him, for he might refuse that which was within his discretionary power; but, anyway, and all that aside, when this court comes to the adjustment of this grant according to principles of law and equity to do justice, it is bound to give the relief suggested by this readjustment. Counsel in argument several times use the word relief. Well enough, if properly understood. This is not a bill or cross bill calling for relief in equity within the sense in which that phrase is generally used. It is simply a correction of errors resulting under the circumstances already stated, and that is all there is to it. [656]

In any event the act of June 25, 1929, directs this court to review the administration of the Northern Pacific grants from the beginning, requiring it to correct any errors. Now to say that the review cannot be had because of lapse of time is to argue that the statute should not be obeyed. I do not think this depends upon whether the railway applied for relief in apt time or not. By the terms of the act under which this suit is brought, so far as concerns this branch of the case, the adjudication is to be made in accordance with equity, disregarding errors in administration. I do

not think you can pare off a little here and a little there by saying that the railway might have done this, that, or the other. I say again that a common-sense view must be taken. The officials of the government could not change the statute to the government's disadvantage by their acquiescence or by a misunderstanding of its terms. Neither should the railway's rights be prejudiced by any error of its officials. The terms of the statute were fixed by Congress. Therefore, it can make no difference as far as the rights of the government are concerned how many years the grant had been administered under this error. It can make no difference so far as the government is concerned how promptly the company acted after the error was discovered. Aside from the general principle that the rights of the United States can be affected only by act of Congress, the 1929 statute expressly directs this court to review the action of any and every official, and, whenever they were wrong, from misapprehension of the law or misunderstanding of the facts, to correct the error and make it right. Now obviously this correction cannot be one-sided. If the officers of the government have misadministered the grant at some point and it may be corrected in the plaintiff's interest, then the joint action of these same offi- [657] cers and the officers of the railway, induced by such misapprehension as the mistake under discussion, should likewise be corrected and adjusted to preserve the mutual rights of the parties.

I think it is preposterous to say that the moment Mr. Mason communicated to the Commissioner the mistake in printing the statute, thereupon the railway was forced to jump in and under whip and spur precipitate a reopening of the whole subject. I think it had a right to rely upon the spirit of fairness and justice, and to expect that the Department of the Interior would recognize what had been done under that error and would co-operate in correcting it. But, all that aside, I am convinced that the letter and spirit of the statute of 1929 direct this court to adjust this grant in accordance with the steadfast doctrines of the common law and the flexible principles of equity, and that the ultimate purpose shall be to do justice; and it is little short of a travesty upon that statute to declare that justice cannot be done in this particular instance because, as is supposed, the company did not act promptly.

The reason assigned by the Secretary for refusing in such case to permit the substitution is urged upon my attention as having weight: that the lands had passed beyond the control of his Department, and an examination would be required to determine whether they were coal or iron. Now it may be that this reason was valid enough for the Secretary in the course of the day-to-day administration of the grant, but it is to my mind perfectly plain that it has no validity here. Either the land is coal or iron or it is not. It is a fact which the government of the United States knows from its own records, or can easily ascertain.

It is said that there has been an adjudication by the Department, and that such adjudication is binding and valid until set [658] aside. I have endeavored to follow the reasoning of counsel upon this question, but without success. I do not see anything that has been adjudged, except that there had been certain losses and that the lands that were selected were all open for selection and that the selection was allowed. Nothing in this proposed reassignment of losses anywhere conflicts with that allowance, with what was ruled, that I am able to see. It is conceded that there are mineral losses. It is conceded that the company has received the lands on indemnity selections. By the proposed reassignment nothing is to be determined. Everything is known. Everything is admitted. There has been a loss and the railway has the land. It proposes to keep the land, but to assign different losses for it.

It is also urged that the truth of the whole matter is that the company supposed it would not have a great number of mineral losses, that it was only through the mineral classification that it discovered the tremendous acreage of those losses, and that this really accounts for the manner in which it assigned losses and made indemnity selections. I fail to see how that enters into the question at all. Whether the company thought it would have many or few, obviously it intended to reserve the mineral losses, whatever they were, to be used anywhere it saw fit nearest the line of the road, supposing there was no limit of distance. Obviously, too, it would not

have done that except for the error in printing the statute.

The United States claims that the company had a choice between using its subsequent losses in first indemnity or leaving the first indemnity limits exposed to settlers until its mineral losses should be established, and that it is bound as by an election. No election is binding unless the facts are known or ought to have [659] been known to the party electing. If the election was made in ignorance of material facts, then it ceases to be binding. This is too fundamental to require discussion. If, as I have held, it is established here that the company elected to use its general losses in first indemnity limits because it supposed by reason of the printed statute it might use its mineral losses beyond first indemnity, assuredly the election was made in ignorance of the controlling fact that it could not so use them, and it follows as a consequence that the elestion was not binding. Certainly if the company made its election wholly independent of whether the mineral losses might be satisfied beyond the fifty-mile limit, the error in the statute could not enter into the question; but, I repeat, it seems to me plain that it must have made its election upon the statute as printed and in ignorance of the restriction now said to control.

When the last map of definite location in Montana was filed in 1883, the general losses exceeded the vacant land in first indemnity limits. It was therefore certain at that time that second indemnity

limits would be necessary. The company made no effort to have them laid down or to have the land surveyed so that it could make selections there for its losses, but, instead, satisfied them, including subsequent, in first indemnity. As said in the discussion of the agricultural issue, there was no evidence nor intimation that the land in the first indemnity belt was more valuable than that in the second. The company may have thought that its mineral losses would be so small that there would be enough land left in first indemnity to satisfy them when they were established, but, on the other hand, its course was consistent with a belief that when the time came the mineral losses could be satisfied "nearest the line of the road" without further territorial restriction. [660]

The company was contending that only lands known to be mineral were excluded from the grant, whereas the United States was contending that all mineral lands, whenever ascertained to be such, were excluded. That was the issue in the Barden case, to which I have referred. It came up in the Circuit Court for the District of Montana in 1891. The Supreme Court finally held, in 1894, after the case was twice argued, that lands ascertained to be mineral at any time before issuance of patent to the company were lost to the grant, thus greatly increasing the probable mineral losses over what the railway had been contending. During those years the company was certainly put upon notice that its mineral losses might be considerable. It was follow-

ing a suggestion in that case that Congress directed mineral classification of all the lands in the place and indemnity limits. The statute directing it was passed January 25, 1895, and the classification began that year. Yet in that year the company used 800,000 acres of Montana subsequent losses in first indemnity. It used 44,000 the following year. There is no evidence that the first indemnity limits were being settled up so fast that the company had to rush its subsequent losses in there to get ahead of settlers; no evidence that it could not at that very time, have applied mineral losses instead. Its action is just as consistent with an assumption that it made no difference which it used, as with the theory that it was consciously being put to an election and "played the indemnity limits" in the way that seemed most advantageous, as suggested in the government's brief. There was an admitted mistake touching the very conduct in question. On the evidence one cannot say that a course of action which might have been induced by the mistake and which might, and actually did, work a disadvantage [661] unless it be corrected, would have been pursued anyway. It seems to me that the error was so vital, the consequences so large, that it ought not to take overwhelming evidence, nor indeed very strong evidence, to justify a ruling that action which would naturally follow the error was the result of it. Of course if the testimony showed the action to have been for some other reason, the court should so regard it, but I do not think the court ought to speculate some other reason.

Aside from all this, however, I do not think the common law doctrine of election has application to selections made as indemnity for place losses. First, the company did not have an unqualified and an unhampered choice in its selections. Lists were required to be submitted to the Secretary. They might be allowed or disallowed, either in whole or in part, not, of course, capriciously, but discretionally, for reasons which seemed to him to justify his action. An essential element of election is that it "may be asserted at the will of the chooser alone * * * In all such cases the characteristic fact is that one party has a choice independent of the assent of anyone else." Mr. Justice Holmes in Bierce v. Hutchins, 205 U. S. 340, 346.

Next, the process of selecting indemnity lands for place losses was necessarily a recurring action throughout the years. The subject was complicated. For certain losses certain sorts of land might be selected, for other losses other sorts. For some losses the railway might go into one territorial limit to select indemnity; for certain other losses it was confined to another area. The quantity of mineral losses could not be apprehended at the beginning of the administration of the grant; it was not until 1895 that the mineral classification began, and it [662] was not until its completion some ten years later that the aggregate of those losses could be ascertained. The condition of lands both in place and in indemnity limits was constantly shifting. The grant has been under administration nearly three quarters of a century. Complications have arisen, such as the restora-

tion of lands to place limits, the enactment of several so-called lieu statutes, the classification for coal, and the withdrawal, beginning with 1898, of great tracts for forest reserves. Now, to inject into this situation the proposition that whenever the railway company made a selection it had thereby elected irrevocably not only to take those lands, but to take them for those particular losses, and that its election bound it for ever and a day, is to apply the common law doctrine of election in a manner without precedent, and to a condition where obviously it does not fit. But even if this view is wrong, it cannot seriously affect the question. If a court of equity, under the maxim that he who seeks equity must do equity, may require a plaintiff who is the victim of a usurious contract to do justice by paying the debt with lawful interest, in other words, to carry out his contract after the usury has been expunged from it; if it may require a plaintiff, as a condition to granting him relief to waive the statute of limitations, Pomeroy's Equity (3rd Ed.) Sec. 393; there ought to be no trouble in holding that the court may require the government here to waive its claim of election in respect to selected lands and permit an opening up of the subject to do justice. It must be continually borne in mind that the doctrine of election is a common law doctrine, that it often works hardship and injustice, and that it would so operate if applied here to each selection, or to any considerable number of selections, made during [663] the years. One of the very things giving rise

to equity jurisprudence is the hardships and inequities frequently resulting from the application of stern and unbending common-law rules to a given situation. To my mind it is perfectly clear, therefore, that, if the doctrine of election has application here, and if it might be said at common law that the company had elected, and that the election was not made in ignorance of a mistake which prompted it, and but for which it would not have been made; if, in short, the contention of the United States that there was an irrevocable election at law is to be sustained, still it remains most certainly true that in this case, under the principle of requiring the plaintiff to do equity, the election cannot prevail to prevent substitution.

I hold that the error in printing the statute not only amply supports the conclusion that substitution should be permitted as a condition of awarding plaintiff the relief which it asks, but also, of itself, necessitates the allowance of defendant's application.

My conclusions upon this whole subject are, first, that even had there been no mistake in the printing of the statute the general equitable considerations to which I have referred would demand that the rearrangement or substitution be allowed; second, that the admitted mistake in the printed statute, I find as a fact, influenced the company in using up the indemnity lands within the fifty-mile limit from the road for its general losses. Had it not been for this mistake, it is as certain as anything can be that it

would have gone for those losses into second indemnity and reserved first indemnity for its mineral. It is impossible for me to believe that the company would have unnecessarily used [664] up its first indemnity lands if it had known that thereby it would be unable to satisfy its mineral losses. In the third place, I think that the question of laches raised by the government has no application here, and that if it has, there has been no laches within the sound view of that doctrine. The company is not an actor, even, in this action. It is not coming into a court of equity seeking affirmative relief within the meaning of the doctrine of laches. The United States has brought this suit, and one of the purposes of the suit, the purpose now under consideration in this hearing, is to adjust the grant; and there inheres in this very purpose the principle that it shall be correctly and equitably adjusted. Even without application for that relief it would be the duty of the court to grant this reassignment. It is but a link in the whole process of adjustment; in no sense is it an application for affirmative relief as by cross bill. And, finally, I am of the opinion that the common law doctrine of election has no application to the selections made by the company from year to year during the administration of this grant, but that, if it should be held to apply, still the mistake in the statute would relieve it from the fact of that election; and that, in any and every event, moreover, the court, under the maxim of requiring the plaintiff to do equity, will, if necessary, set aside the election and readjust without reference to it.

Other reasons are assigned by Mr. Frost at some length, some of which do not appeal to me and others of which seem of such slight importance that I do not think it necessary to discuss them. So also with some of the objections urged by the government, which I think insufficient to overcome the equitable doctrines already stated, which appear to me to be controlling. [665] I am content to rest my opinion upon what I have written, unless, as claimed, the railway has failed to show that the lands sought to be supported by mineral losses are not valuable for coal and iron, so as to exclude them from the term "agricultural."

It is first insisted this fact must be proven by clear and convincing evidence, and certain authorities are cited. I hold that the burden of proof is upon the company because it is seeking to have this substitution made, and it must show it is entitled to it; and as this element of coal or iron is one of the factors in the problem, it must go forward and offer proof, which must necessarily be of an apparently negative character. I hold, however, that the notion of some of the officials of the Land Office that this evidence has to be clear and convincing is without foundation. The doctrine of the clear and convincing character of evidence has its origin and its application in certain classes of cases, and it extends no further. He who alleges fraud, it is said, must prove it by clear and convincing evidence, because fraud will never be presumed, and because every presumption is against him who asserts it.

So if an executor or an administrator deals with the heir at law, shortly after the heir comes of age, it will be presumed that an undue influence had been exercised; that the youth and inexperience of the heir had been taken advantage of, and therefore, it is said, and properly, that when he sets up title acquired from the heir at this time, he must show by the most convincing evidence, first, that there was no element of undue influence or fraud exerted, and moreover, that the transaction was in every way fair and just to the heir. So of the relation of guardian and ward, and of trustee and cestui que trust. Obviously, all these cases rest not only upon the principle of un- [666] due influence, but upon the further principle that the facts are within the exclusive knowledge of the trustee, the guardian, the executor, the administrator. So, likewise, if one wrongfully obtains possession of another's property and disposes of it in one way or the other, and offers to return what he received for it, the burden is upon him to show by clear and most convincing evidence that he not only got a fair price for it, but also that the negotiations by which he sold it were of such a character that he could not have received any more. The facts of the disposal were within his knowledge. He has no right to call upon the person whose property he has made away with to offer proof. He must prove the whole case and prove it by clear and convincing evidence. In general, it may also be said that in any case in which, in the nature of the transaction, the facts are within the exclusive or substantially exclusive possession of one party, he

must go forward and prove clearly and convincingly what those facts are. Now all this rule as to clear and convincing proof, as used by the courts, means this and this only, that the court must be certain that nothing has been concealed; that the person who has exclusive knowledge, substantially so at least, has made a clean breast of the whole transaction. He must explain to the minutest detail, so far as the nature of the case permits; but when he has done so, he has then carried the burden imposed upon him. Now, how by any possibility these principles can be applied to the proof of the coal or iron character of this land is beyond my comprehension. The company knows no more about it than does the government. It has no greater means of acquiring knowledge than has the government. On the contrary, I should say the government, by its geological survey, and by the general course of [667] its examination of the public lands of the United States to the westward of the Mississippi River, would have more knowledge, would have more opportunity for accurate knowledge, of those facts than has the railroad. Of course, it is impossible for the company to show that there are no coal or iron deposits on these lands. It is like trying to prove that there is no gold in a mining claim. It would require not only a surface, but a sub-surface, examination of every section or half section or quarter section, as the case might be. It is enough for the purpose of making out a first-instance case, for the company to show that there are no known deposits of coal or iron upon these lands, and that they are

not surrounded by coal and iron lands, so that there might be some presumption that the veins or deposits extended into their boundaries. Any ordinary and reasonable proof which makes a prima facie case that the lands were open to selection for mineral losses is sufficient to require the government to go forward with its evidence. Now the government has offered in this case no proof upon these questions whatever, and it is necessary, therefore, only to examine, in view of what I have just said, the kind and extent of the evidence offered by the defendant.

Mr. Schwarm testified that he had been in charge of the railway's coal leases for many years; that some of the lands had been classified by the Department of the Interior, pursuant to statute, as non-coal; that some had been withdrawn for coal classification, and later released; and that no part of the balance was located in an area known to contain coal. It seems to me that this evidence is not only competent, but that it has reasonably convincing force. I should say that without question any person familiar with the Palouse country might testify that there are no gold or silver or coal or iron mines there. That is not to say [668] as a geological possibility that there might not be some, but only that none is known at the present time. Mr. Schwarm certainly made a prima facie case in view of the government's classification or non-classification of substantial portions of the land. Without going further into the details of his testimony, plaintiff offering no evidence, I am bound to find that the lands are non-coal.

As to the non-iron character, Mr. Schwarm went no further than to say that he used the utmost care to make sure that the lands had no value for iron. The company in its brief said that geological literature, of which the court might take judicial notice, negatived the possibility of any of the lands being iron lands. I do not consider that Mr. Schwarm's statement amounted to evidence upon which a finding could be based; and as the company did not cite any specific documents, I addressed a letter to counsel on both sides inviting citations to literature and documents bearing upon the case. Mr. Frost supplied me a list of publications, and upon some of them made certain comments which are noted below, with the citations, as follows:

Minnesota.

Monograph No. 52, United States Geological Survey (1911), C. R. Van Hise and C. K. Leith.

Bulletin No. 27, March 17, 1937, the University of Minnesota, by E. W. Davis, entitled "The Iron Ore Deposits of Minnesota."

(The literature in reference to iron deposits in Minnesota is very voluminous. Since the above monograph No. 52 there have been many smaller publications that discuss one or the other of the well known districts.)

North Dakota.

(Our geologists do not know of any publication that mentions an iron deposit in the state of North Dakota, so the documents here mentioned are negative.) [669]

University of North Dakota, Departmental Bulletin No. 11, Geology and Natural Resources of North Dakota, issued by Division of Mines and Mining Experiments in cooperation with North Dakota State Geological Survey.

18th Biennial Report of the State Geological Survey, 1933-1934.

19th Biennial Report, North Dakota Geological Survey, 1935-1936.

Montana.

United States Geological Survey Bulletin No. 507 (1912), entitled, "Mining Districts of Western United States", p. 2 (29).

United States Geological Survey Bulletin No. 715 (1921), Iron Ore Deposits Near Stanford, Montana, pp. 85-92.

United States Geological Survey Bulletin No. 540 (1912), Beds on Blackfeet Indian Reservation, Montana, pp. 329-337.

United States Geological Survey Folio No. 56, Little Belt Mountain Quadrangle, Iron Ore, Woodhurst Mountain (found next to last printed page of folio).

War Department Report on Available Raw Materials for Pacific Coast Iron Industry, Vol. 3, Montana Iron Ore, pp. 2-5 inclusive of Appendix E-1.

United States Geological Survey Professional Paper No. 78; Geology and Ore Deposits, Phillipsburg Quadrangle.

United States Geological Survey Professional Paper No. 74, Geology and Ore Deposits, Butte District.

Idaho.

United States Geological Survey Bulletin No. 507 (1912), p. 26.

Twenty-second Annual Report, United States Geological Survey (1900-1901), Part II, p. 638.

War Department Report on Available Raw Materials for Pacific Coast Iron Industry, Vol. 3, Appendix E-1, pp. 11-15 inclusive.

Washington.

Bulletin No. 27, State of Washington Division of Geology, pp. 37-115.

Annual Report for 1901, Washington Geological Survey, Vol. 1, Part IV, Iron Ores of Washington.

United States Geological Survey Bulletin No. 285 (1906), p. 195.

United States Geological Survey Atlas, Snoqualmie Folio No. 139, Geology of Snoqualmie Quadrangle.

Bulletin No. 2, September, 1917, Washington State University Bureau of Industrial Research, Investigation of Iron Ore Resources of Northwest.

Transaction 30, pp. 356-366, American Institute of Mining Engineers (1901), Cle Elum Iron Ores of Washington.

War Department Report on Available Raw Materials, etc., Vol. 3, Appendix E.-3, pp. 3-21

inclusive. (This report on page 4 shows that the entire production of iron ore for the years 1926-1933 inclusive came from Big Iron Mine, Stevens County.) [670]

The publications themselves were all obtained from the public library and made available to me, except the two Biennial Reports for North Dakota, U. S. Geological Survey Bulletin No. 715 (1921), Iron Ore Deposits near Stanford, Montana, which was missing from the library's bound volume, and the War Department Report on Available Raw Materials for Pacific Coast Iron Industry. The company also submitted a map of each state showing the townships within which the selected lands lay and the location of known iron deposits with relation to them. It advised me that copies of its letter and of the list of publications and the maps would be furnished to plaintiff's counsel. I later received the following letter from Judge Biggs:

Dear Mr. Graves:

We received from Mr. Frost a list of publications in reference to iron deposits, enclosed in his letter to you of May 22nd. The investigation which we have had made of the publications of the United States Geological Survey do not show any published documents of the Geological Survey other than those listed by Mr. Frost, except we find that there is Plate I, Professional Paper No. 184, Pre-Cambrian Rocks of the Lake Superior Region, by C. K. Leith, R. J. Lund and Andrew Leith, U. S.

Geological Survey, 1935, dealing with iron deposits in Minnesota. We know of no publications by the various States other than those listed by Mr. Frost.

We are sending a copy of this letter to Mr. Frost.

Very truly yours,
J. CRAWFORD BIGGS.
Special Assistant to the Attorney General.

I shall hand you herewith the letters from counsel and the maps to which I have referred. Only 320 acres in Minnesota are involved in the proposed substitutions, and though they appear in the general direction of the course of the great iron deposits in that state, they are thirty miles from any indicated occurrence. [671] The bulletin of the University of North Dakota concerning its geology and natural resources contains no reference to iron, dealing principally with the deposits of lignite and clay. Bulletin 507 of the Geological Survey, Department of the Interior, (1912), contains the following comment upon iron in the three remaining states:

(p. 26) "Idaho contains few deposits of iron ore and none of them are mined at present. Iron Mountain, in Washington County, near Snake River, is the principal locality."

(p. 29) "No important deposits of iron are known in Montana. Manganese has been mined at one or two places in Jefferson County."

(p. 42; Washington) "Iron ores are present at a number of places, but are not as yet uti-

lized. Magnetite is found at Snoqualmie Pass, in King County, in connection with metamorphosed limestone, and on Skagit River, in the northern Cascades, as lenses in slate. Chromiferous magnetite appears at Clealum, in Kittitas County, on the contact between sandstone and serpentine. Brown iron ore and bog iron is found at several places in Stevens County—for instance, near Colville and Chewelah."

The references and map for Washington show numerous occurrences, none of which, however, falls within the indicated townships. Mr. Frost's letter states that the nearest deposit is six miles away.

Upon the documents, maps and letters of counsel, I think it should be found that no part of the selected lands have coal or iron.

That "agricultural" means "nonmineral" in the present situation is ruled elsewhere. Nonmineral character, except as to coal and iron, now separately ascertained, was automatically established when the patents were issued upon general losses.

Without further summary, I conclude that the railway's request for substitution should be granted.

[672]

IX. Availability of Withdrawn Lands for Indemnity Selections.

Rulings upon other points have established the amount of the deficiency, the character of lands which might be available as indemnity, the status of certain particular areas, and the adaptability of

certain of the losses. Yet, as I have indicated, substantially all of the lands in dispute are locked up in the national forests and other government reservations.

The lands are within the indemnity limits of the grant, but not having been then selected by the company as indemnity, they were included within various withdrawals. The withdrawals were made, pursuant to statutes, by order of the Secretary of the Interior, Presidential proclamation or executive order, and, in a few instances, by order of the Federal Power Commission. The purposes were principally for national forests though also, to a much smaller extent, for military reservations, Indian reservations, reclamation, power sites, stock drives, irrigation, bird reservations, game preserves, petroleum reserves, flowage, and administrative purposes. In some instances the withdrawals were by specific description, but usually by designation of boundaries. It may be taken as a matter of common knowledge, and is indicated by the testimony of the foresters, that the forest reserves, which constitute the great bulk of the withdrawn lands, include within their boundaries greater or less quantities of privately owned land, interspersed over the areas. In fact, many of the forests include indemnity lands patented to the railway before the reserves were created.

The areas of the odd-numbered withdrawn sections in the different indemnity belts in the several states, with the date and purpose of each withdrawal, and the number of plaintiff's exhibit pertaining thereto, are as follows: [673]

Grant of 1864.

Second Indemnity Limits.

Govt. Ex.	Date	Purpose	Acres	Acres
		Wisconsin		
110	Mar. 15, 1921	Power	40.	
		Minnesota		
111	Jan. 13, 1906	War	.63	
		Montana		
112	Feb. 3, 1892	Forest	5,120.	
113	Mar. 1, 1898	"	279,539.53	
114	July 14, 1899	"	4,004.38	
115	Mar. 19, 1900	Indian	34,088.61	
116	Dec. 18, 1901	Forest	27,828.	
117	Aug. 16, 1902	"	102,517.79	
118	Aug. 24, 1903	Reclamation	425.90	
119	Oct. 31, 1903	Forest	917.80	
120	Jan. 29, 1904	"	19,520.	
121	May 12, 1904	"	41,183.35	
122	Sep. 20, 1904	Reclamation	3,109.50	
123	Oct. 3, 1905	Forest	42,252.01	
124	Jan. 11, 1906	"	1,038.79	
125	Apr. 12, 1906	"	1,473.43	
126	June 2, 1906	"	4,046.05	
127	Sep. 17, 1906	"	498.05	
128	Sep. 18, 1906	"	11,163.14	
129	Oct. 9, 1906	"	1,825.56	
130	Nov. 5, 1906	"	75,785.79	
131	Nov. 6, 1906	"	4,028.94	
132	Mar. 2, 1907	"	50,553.59	
133	Apr. 19, 1912	Power Site	1,117.02	
134	Mar. 18, 1918	Stock Drive	2,305.64	
135	July 1, 1921	Power	90.85	714,460.72

Govt. Ex.	Date	Purpose	Acres	Acres
		Idaho		
136	Mar. 1, 1898	Forest	163,280.	
137	Mar. 21, 1905	"	83,653.38	
138	Nov. 6, 1906	"	520.16	
139	Dec. 11, 1906	"	3,484.	
140	Mar. 2, 1907	"	160.	
141	May 25, 1915	Irrigation	40.	251,137.54
	Total withdrawn, Second Indemnity Limits			965,638.89

[674]

First Indemnity Limits.

Govt. Ex.	Date	Purpose	Acres	Acres
		Minnesota		
142	May 14, 1915	Bird Res.	.27	
143	Oct. 13, 1920	" "	.33	.60
		Montana		
144	Mar. 1, 1898	Forest	294,395.36	
145	July 14, 1899	"	3,902.60	
146	Mar. 19, 1900	Indian	17,962.32	
147	Dec. 18, 1901	Forest	37,512.90	
148	Sep. 4, 1902	"	4,152.20	
149	Oct. 31, 1903	"	8,609.53	
150	Jan. 29, 1904	"	43,533.72	
151	Feb. 12, 1904	"	5,471.51	
152	May 12, 1904	"	73,550.31	
152A	July 14, 1899	"	320.76	
153	Oct. 3, 1905	"	6,949.45	
154	Jan. 11, 1906	"	2,254.32	
155	Mar. 7, 1906	"	520.	
156	Apr. 12, 1906	"	12,860.24	
157	June 2, 1906	"	10,476.19	
158	Sep. 17, 1906	"	3,394.	

Govt. Ex.	Date	Purpose	Acres	Acres
159	Sep. 18, 1906	Forest	9,601.	
160	Oct. 9, 1906	"	320.	
161	Nov. 5, 1906	"	7,968.24	
161A	Nov. 6, 1906	"	4,682.17	
162	Mar. 2, 1907	"	30,355.66	
163	June 22, 1909	Power	40.92	
164	Apr. 16, 1917	Game Pres.	778.04	
165	Mar. 18, 1918	Stock Drive	299.56	579,911.00
		Wyoming		
166	May 22, 1902	Forest	33,560.	
167	Jan. 29, 1903	"	13,607.99	
168	Apr. 21, 1903	Reclamation	1,083.79	
169	June 8, 1904	"	2,006.04	
170	Dec. 6, 1915	Petroleum	360.	50,617.82
		Idaho		
171	Mar. 1, 1898	Forest	114,276.55	
172	Dec. 18, 1901	"	515.	
173	Mar. 21, 1905	"	141,942.72	
174	Jan. 18, 1906	"	784.05	
175	Dec. 11, 1906	"	2,777.77	
176	Apr. 21, 1910	"	160.	
177	Jan. 13, 1914	Power Site	120.	260,576.09
		Carried forward:		891,105.51

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Govt. Ex.	Date	Purpose	Acres	Acres
		Brought forward:		891,105.51
		Washington		
178	Mar. 1, 1898	Forest	72,543.80	
179	Dec. 18, 1902	"	85,193.35	
180	Aug. 25, 1906	"	1,360.	
181	July 26, 1906	"	30,530.07	
182	Aug. 25, 1906	"	5,909.68	
183	Mar. 2, 1907	"	1,172.52	
184	Sep. 17, 1909	Power	583.79	
184A	Feb. 1, 1921	"	133.29	
184AA	May 15, 1924	"	92.74	
184B	Aug. 22, 1904	Reclamation	40.	197,559.24
		Total withdrawn, First Indemnity Limits		1,088,664.75
		Mineral Indemnity Limits		
		Wisconsin		
110A	Dec. 2, 1920	F. P. Project		40.
		Minnesota		
111A	Oct. 24, 1901	Flowage	57.25	
111B	Mar. 22, 1905	"	83.	140.25
		Montana		
185	Sep. 4, 1902	Forest	304,331.14	
186	May 4, 1904	"	9,565.47	
187	Nov. 3, 1906	"	240.	
188	(See note on	Exhibit)	0.	
188A	Aug. 9, 1909	Power	299.71	
188B	Nov. 23, 1914	Admin.	34.42	
188C	Dec. 6, 1915	Petroleum	73.32	314,544.06
		Total withdrawn, Mineral Indemnity Limits		314,724.31
		Total withdrawn, Grant of 1864		2,369,027.95

The apparent total, as thus shown, is 2,369,027.95 acres. In Idaho, however, within the rule that the company may select lands in second indemnity only to the extent of its subsequent losses, about 30,000 acres of nonmineral withdrawn lands are be- [676] yond reach. Also, as held, 3,300.82 acres of Fort Ellis lands are closed to selection. Finally, 92,276.70 acres of the withdrawn lands are conceded to be mineral, and are hence ineligible. These deductions bring the total down to about 2,244,000 acres. By comparing the net total with the ascertained deficiency of 2,220,224.17 acres, it will be seen, assuming that the unindemnified losses making up the deficiency are all such as may be applied to the lands in question, there are just barely enough to make up the deficiency. It may also be noted that the deduction of the inadmissible lands just specified so reduces the indemnity areas that even after having diminished the unsatisfied losses by the quantity of the Portage conflict there is little, if any, surplus. Thus, practically, the Portage question, becomes moot.

To what extent, if any, resort may be had to the withdrawn lands to satisfy the acknowledged losses is now the question. This brings us squarely to the Forest Reserve case, United States v. Northern Pacific Railway Company, 256 U. S. 51, which is both the occasion and the guide for the present adjustment.

There the court put as the test of the validity of a withdrawal for governmental purposes, whether at the time of the withdrawal "the lands available as indemnity" were "sufficient to supply the losses".

If the decision in the Forest Reserve case did not preclude it, strong reason would appear to exist for the position that the right of selection was a valuable right which the government could not infringe by any withdrawals in the indemnity limits without the consent of the railroad, even though suffi- [677] cient acres were left to match the deficiency. If the government might withdraw any lands, it might withdraw the best, so that in effect it, instead of the company, would be doing the selecting. By that view all of the withdrawals in any case would be totally ineffective. The argument is thus put in United States v. Colton Marble & Lime Company, 146 U. S. 615, 618, where a subsequent grant of place lands to the Southern Pacific overlapped the indemnity limits of the Atlantic & Pacific:

> "Suppose, for instance, it should turn out that only half of the indemnity lands were necessary to make good the deficiency, and that one-half of such lands were well watered and valuable, while the remainder were arid and comparatively valueless, obviously the right of selection would be seriously impaired if it were limited to only the arid and valueless tracts. In fact, every withdrawal of lands from the aggregate of those from which selection could be made would more or less impair the value of

> the right of selection. * * * Being within the granted limits of the Southern Pacific, all its rights thereto vested at once, at the time of the filing of the map of definite location, and were not and could not be added to after that time; everything it could have in those lands it had then, and at that time there was an existing prospective right on the part of the Atlantic and Pacific Company to make a selection. That prospective right would be impaired by the transfer of the title of a single tract to the Southern Pacific."

See also Payne v. Central Pacific Ry. Co., 255 U. S. 228, 236, decided six weeks prior to the Forest Reserve case, and quoted above, where the granting act was similar to the Act of 1864, and where the court emphasized that the ultimate obligation of the government in respect of the indemnity lands was on the same plane as that respecting the lands in place. This view, as presented by the company on the authorities noted, appeared to me during the argument as of considerable weight.

Should it be thought that all reservations would be ineffective as against the company's right to "select", it would be [678] necessary to consider a possible distinction as respects second indemnity limits. The act provided that in lieu of general losses, other lands should be "selected" by the company. It also provided that indemnity for mineral losses should be "selected". The resolution, how-

ever, provided that for subsequent losses the company should be entitled to "receive" other lands under the direction of the Secretary. I should be inclined to hold that the company had the same right to select within second indemnity limits as within first and mineral, and the Land Office has made no distinction in practice.

The railway contends that the decision in the Forest Reserve case does not preclude what might be called the theory of the inviolability of the indemnity limits. But I am now thoroughly persuaded that if the Forest Reserve case does not preclude that view, the opinion of Mr. Justice Holmes in United States v. Southern Pacific Railroad Company, 223 U. S. 565, does. There it was held that the right to indemnity depends upon the state of the lands selected at the moment of choice, and that therefore the railway had the benefit of restorations procured by the government to the indemnity limits. Conversely, it must suffer by depletions of the indemnity limits at the hands of the government. Now the Forest Reserve case qualifies the converse of this sweeping principle by the condition that the government may deplete for its own purposes only so long as it leaves a sufficient quantity in the indemnity limits to meet the unsatisfied losses in the place limits. Thus the grant of indemnity may become in the last stage a grant of quantity and not of quality. I am firmly of the opinion that the Forest Reserve case lays down the rule that the government may reserve or appropriate to its [679]

own uses lands in the indemnity limits so long, but only so long, as that which remains is sufficient to meet the unsatisfied losses. The rule does not have all the force of a judgment, because the case was remanded for a further hearing which was never had, the present suit resulting instead. I think, however, that the considered opinion of the court, though never effectuated by judgment, must be regarded by me as conclusive of the subject there under review. I think, moreover, that the court announced a rule which, in the light of the Southern Pacific case, just cited, is reasonable, judicious, and little less than inescapable. Again we must recall that the act is "a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of Congress," Missouri, Kansas and Texas Railway Company v. Kansas Pacific Railway Company, 97 U. S. 491, 497, "illy as it may accord with common law notions." United States v. Southern Pacific Railway Company, 146 U. S. 570, 597.

Many of the plaintiff's exhibits, and much of its oral testimony, were devoted to presenting, alternatively, what counsel called the segregated and consolidated theories. By the segregated theory it sought to show when each of the several indemnity belts, and principally the second indemnity belt in each of the states, became insufficient to meet the losses which it assumed might be satisfied therein. By the consolidated theory it sought to ascertain when the indemnity limits, all taken together, became insufficient to meet the remaining unsatisfied

losses, all taken together. Strangely, counsel say not a word in their brief upon these two alternative theories, though they request findings which suppose the applicability of the segregated theory. There is, however, no longer room for the segregated theory. My rulings [680] upon the use of prior losses in second indemnity and upon substitution lead to the treatment of all losses and lands together, for, in the last analysis, having held that prior losses may be used in second indemnity limits, and that mineral losses may be substituted for subsequent, it is as though all losses were equally flexible, and might be satisfied indiscriminately. This should be qualified by reference to my holding that losses in one state or territory may not be satisfied in the second indemnity belt in another. Moreover, the formula of the Forest Reserve case is to treat all losses and all lands together, and the case would be insoluble under any other interpretation.

The problem, therefore, is to determine when the grant became deficient, by comparing the unsatisfied losses with the indemnity lands which, but for their withdrawal, would have been available. Under the Forest Reserve rule, all withdrawals which, on being made, would yet leave enough land to meet the unsatisfied losses, were valid; all which, on being made, would leave less than enough, were invalid.

At this point the parties differ sharply. The United States contends that in computing the remaining lands, all vacant lands within the indem-

nity limits should be taken into account, including (a) lands subsequently ascertained to be mineral, and (b) lands unsurveyed. The company contends just the reverse.

As to mineral lands, it is indisputable that lands ascertained to be mineral were of that character at the time the grant took effect, and, under the Barden case, were never obtainable. It matters not that in the Barden case the lands were in place. Isn't it obvious to every understanding that lands mineral in 1895-1905 had been mineral from that day when Nature [681] raised up the mountains and put the metals there—just as much in indemnity limits as in place?

As to lands unsurveyed, Mr. Frost cites certain decisions establishing the doctrine that "a survey of public lands does not ascertain boundaries; it creates them". When the grant was made, the vast region from the Missouri River to the Pacific Coast was practically unsurveyed. Now, the provision for indemnity was that whenever any of the granted sections or parts of sections should have been disposed of, other lands should be selected "in alternate sections, and designated by odd numbers". Until alternate sections had been established and designated by odd numbers there could be no selection. It must have been presumed that in the course of orderly survey the boundaries of sections would be created, and that then, and then only, could the right of selection by any possibility attach. Hence the regulation of the Secretary, that only surveyed

lands might be selected, was but an application of the principle laid down by the courts. The United States, in all its history, has never undertaken, except in special cases like the grant of place lands in aid of railroad construction, or the provision for mineral locations, to dispose of its unsurveyed public domain. It is true it permitted preemptioners and homesteaders to settle upon unsurveyed lands. That, however, created no vested interest in the settler, the government promising only that when the land was surveyed the settler should have the prior right.

The government seeks to distinguish between "lands available for indemnity" and "lands available for selection," insisting that lands were available for indemnity by reason of their lying vacant in the indemnity limits, and were thus to be taken into account under the Forest Reserve rule, though not obtainable. I [682] cannot acquiesce in the distinction. I cannot follow the reasoning which says to the company, "The lands are available, but you cannot get them." I think Mr. Frost is justified in saying in his brief that such a distinction is pure juggling with words. I therefore hold that the appropriations of land by the government to its own uses were valid as against the company's claims to indemnity whenever, and only whenever, at the time of the particular appropriation, sufficient vacant surveyed nonmineral lands remained in the indemnity limits, in the aggregate, to meet the aggregate of unsatisfied losses.

The United States, by its method of computation, Govt. exhibits 107, 108 and 109, revised, shows an excess in the indemnity limits until 1902, thus validating the large withdrawals of 1898. The company, however, in its exhibit 137 revised by excluding mineral and unsurveyed lands shows the indemnity limits deficient over 5,000,000 acres just prior to March 1, 1898, thus invalidating the withdrawals of that date. I hold the company's method sound in theory and result.

I think I have not underestimated the responsibility resting upon me in this decision. On March 1, 1898, alone, 1,155,822.58 acres were withdrawn for national forests. By exclusion of unsurveyed and mineral lands from the calculation of available indemnity these withdrawals were invalid, whereas by inclusion they would have been valid. Lesser withdrawals during the next three or four years suffered the same fate. The issue involves, in all, close to one and one-half million acres.

The United States bases its contention upon three propositions, first, that it is the rule of the Forest Reserve case; second, that it is in harmony with the practice of the General Land Office; and third, that it was applied to the Santa Fe grant. [683]

The Forest Reserve case states the applicable rule (256 U. S. 51, 66):

> "* * * it was not admissible for the Government to reserve or appropriate to its own uses lands in the indemnity limits required to supply losses in the place limits."

A more difficult question says the court is "whether it sufficiently appears from this record that the grant was deficient at the time of the temporary withdrawal; that is that the lands available as indemnity were not then sufficient to supply the losses." Because the court said nothing about whether mineral lands or unsurveyed lands were to be counted as available, it is not to be supposed that it intended to say that they should be counted. Most certainly, not mineral lands; they were reserved to the United States, and hence were never available. They were excluded before any computation could begin for calculating the lands required to supply the losses. The court was not called upon to say anything about them. The withdrawal under review was made January 29, 1904. At that time the mineral classification was nearing completion, and great quantities had already been classified as mineral and thus eliminated from possible consideration. The exclusion of them alone, still counting unsurveyed lands, would leave an excess just prior to March 1, 1898, of only about 140,000 acres.

Nor was the court called upon to say anything about unsurveyed lands. The stipulation quoted at page 62 of the opinion, by its terms, excluded both mineral and unsurveyed lands.:

> "The plaintiff admits that when the withdrawal order of January 29, 1904, was issued, the lands patented to the defendant or its predecessor in interest within the primary and all indemnity limits, plus all other lands within the

> primary or place limits, not patented, but which passed under the grant, and also [684] all odd-numbered sections in all indemnity limits which the defendant was entitled to select under the regulations of the land department did not equal the sum total of all the odd-numbered sections lying within the primary or place limits of the grant, and this condition still obtains. * * *''

The only reason the case was not decided upon the stipulation was that the government did not admit that the correct measure of the grant was the aggregate area of all the odd-numbered sections in the primary or place limits.

It is thus apparent the court was dealing only with lands which the company was entitled to select; and as neither mineral land nor unsurveyed land was open to selection it is certain they were excluded in declaring the doctrine of the case. But even without this perfectly obvious consideration, the logic and the whole theory of the case rests upon the assumption that the lands which were left could be gotten by the company. It is neither good sense nor good logic to say that they were available to the company either potentially or otherwise when they could not have been obtained.

The argument that plaintiff's position is in harmony with the practice of the General Land Office is met by the fact that its habit was to recognize all depletions by the United States as valid—condemned by the court in the Forest Reserve case.

Finally, the ruling of the Department of the Interior March 22, 1932, in the case of Atlantic and Pacific R. R. Co. (Santa Fe Pacific Ry. Co.) a photostatic copy of which has been supplied, cites as authority the Department's own ruling in the present case, and adheres to that ruling. It interprets the Forest Reserve case in accordance with the interpretation now urged by counsel, making the same distinction as between lands available for indemnity and lands available for selection. So it all comes [685] around again to the meeting of the Forest Reserve case. I cannot accept either as precedent or persuasive authority the interpretation put upon it by the Department. This court must determine for itself what the Forest Reserve case establishes, and that determination cannot be aided by any effort of the Department to maintain its own previous ruling and to make the Forest Reserve case justify it.

The company's exhibit was prepared upon the supposition that the lands east of Duluth in conflict with the Portage road, found to be 347,141.24 acres, were proper base for indemnity selections, and without reference to the Montana place error of 5,435.46 acres; but the rulings adverse to it upon these points do not convert the deficiency into an excess March 1, 1898, so as to justify any part of the withdrawals of that date, the deficiency prior to those withdrawals having been, as stated, over 5,000,000 acres.

The company did not attempt to show the status of the grant at any date earlier than March 1, 1898. During the introduction of testimony its counsel stated that it would let the withdrawal of 5,120 acres in 1892 go, unless it were able to make a purely legal argument with respect to it. None was made except the argument that the United States had no right to invade the indemnity limits under any circumstances, which I have rejected. I must, therefore, consider that withdrawal valid.

In applying the term invalid, or any similar expression, to the action of the government in erecting the forest reserves, or in making withdrawals for other purposes, it should not be implied that there was anything reprehensible about it. Most of the withdrawals were made before the extensive losses and depletions [686] had been established by the mineral classification. Doubtless the government miscalculated the mineral as seriously as did the railway. But more particularly, the government had no special designs on the odd-numbered indemnity sections. It was withdrawing huge areas into which the indemnity sections happened to fall. Should the company have been permitted to select and sell them, the boundaries of the forests would have still remained, and the conservation policy of the government would not have been frustrated, though I do not question the wisdom of the act of 1929 in taking the company's selection rights by eminent domain, which, in substance, is what it does.

Coming down to the present time, the deficiency now, as found, is 2,220,224.17 acres. The total in the forests and other government reservations, deducting surplus Idaho second indemnity Fort Ellis, and conceded mineral, as computed above, is about 2,246,000 acres. Thus the deficiency of 5,000,000 acres in 1898 has become an excess of perhaps 24,000 in 1937. This has resulted from the progress of survey and selection, by re-determination as to mineral character, by corrections of the place limits, by restorations to the indemnity limits; in short, by a variety of diminutions of, and charges to, the grant and by net enlargements of the selectable land in the indemnity limits from whatever cause. The small excess which may now perhaps exist validates to that extent the appropriations by the government. Though it may retain this quantity, the right of selection is with the company. The withdrawals having been invalid, the occurrence, subsequently, of an excess, would not legalize any particular withdrawal. If any, the first in point of time; but I do not see how it would be possible for me to make any distinctions from among the large simul- [687] taneous withdrawals on March 1, 1898. I hold that, all withdrawals except that of 1892 having been illegal in the first instance, the company, with that exception, may make its selections out of all the withdrawn lands to the extent of the deficiency as found, subject to these minor qualifications:

(a) The Fort Ellis restored lands are excluded from selection;

(b) In Idaho second indemnity the company may not make selections in the aggregate, including those heretofore made in that belt, in excess of its subsequent losses in Idaho. The first withdrawal therefrom having been for 163,280 acres en masse, it is my opinion, upon the same principle that forbids discriminations between the simultaneous withdrawals from the grant at large, that the right of selection is with the railway.

(c) Lands conceded to be mineral may not be selected.

The government, insisting that other base be supplied in support of selections now resting upon the Portgage base, has not made an issue concerning the character of losses thus required. Similarly as to lands, generally, patented in error. It is obvious, particularly, that, within the terms of the granting act, no losses are applicable to the lands beyond the sixty mile limit in Idaho and Montana, erroneously patented, though, by concession, they have been charged to the grant. My rulings have made the several sorts of losses, in practical effect, interchangeable, and have dispensed with the tract-for-tract assignment. The very necessities of the case appear to require these things, the problem becoming one not of supplying the losses, but of satisfying the deficiency. [688]

There remains a somewhat puzzling difficulty to which counsel have given no attention either in

testimony or argument. Much of the land in these forest reserves is unsurveyed, and the practical difficulty of selecting is apparent. I have concluded, however, rather than to delay this report further, that the detail of selection may be left open to a subsequent hearing. The decree now to be entered is in its nature, and I suppose will be in form, interlocutory, under the provisions of the bill to supplement the act of June 25, 1929. With my present light upon the subject, I should be inclined to hold that a protraction of the survey of the lands as yet unsurveyed should be made and the selections based thereon. The excess at present is so small—about 24,000 acres out of 2,244,000—as to bring the case almost within the rule of the Land Office and the courts, that no selection is necessary when all the lands are required to satisfy the deficiency. All are appropriated. St. Paul & Pacific Railroad Company v. Northern Pacific Railroad Company, 139 U. S. 1, 19; United States v. Colton Marble & Land Company, 146 U. S. 615, 616; 25 L. D. 511. Identification upon the ground for purposes of valuation would still be necessary, but beyond that there would be no problem of selection. I anticipate, should the principles of my conclusions concerning these unsurveyed lands be sustained, counsel will have no difficulty in stipulating a method of selection.

What I have said just above is in view of the provisions of the act of June 25, 1929. Although the language is somewhat contradictory, I feel con-

vinced that by that act it was intended that a final decree should be made in this case of the land grants to the Northern Pacific, and, while it is true, as I think and have held, that unsurveyed lands could not be selected in course of re- [689] gular administration of the grant, yet that difficulty should not stand in the way of making the selections here referred to. The government has placed the lands in reservations, and has declared its intention to keep them. They could, therefore, never be available to the company, and it seems to me that it makes but little difference at this time whether they are surveyed or unsurveyed. The railroad being entitled to receive them whenever they were surveyed, I think the principle that equity regards that as done which ought to be done should apply; and the lands will now be treated as surveyed. The only thing necessary for the purpose of selection and subsequent valuation is identification, and that may be had for all practical purposes as well by protraction as by actual survey.

This concludes the discussion of the grant of 1864. I have endeavored to rule upon some minor points which were not discussed in the briefs, but which seemed to be necessarily involved. I have refrained from reference to many points of detail upon which I think the parties to be in agreement, or which will be determined by general principles which I have stated. It has been my purpose to make this report sufficiently comprehensive to afford a basis for the selection by the company of the specific lands for

which it is entitled to compensation, and for the quieting in plaintiff of such as remain. The parties will best know to what extent the selection lists now on file as exhibits are suitable as final descriptions, and in what manner, and when, they should be amended to comply with the final decree. I do not consider a tract-for-tract specification of losses necessary, but think the quantity by which the grant is found deficient may be selected from the areas designated, subject to the qualifications stated. [690]

GRANT OF MAY 31, 1870.

I. The Grant.

The act of 1864 authorized the Northern Pacific to construct a line

> "to some point on Puget's Sound, with a branch, via the valley of the Columbia River, to a point at or near Portland, in the State of Oregon, leaving the main trunkline at the most suitable place, not more than three hundred miles from its western terminus;"

The Joint Resolution of 1870 authorized it

> "to locate and construct, under the provisions and with the privileges, grants, and duties provided for in its act of incorporation, its main road to some point on Puget Sound, via the valley of the Columbia river, with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade Mountains to Puget Sound;"

The resolution thus designated as a branch the portion of the road across the Cascades, formerly part of the main line, designated as part of the main line the route down the Columbia, formerly called a branch, and continued the main line down the Columbia to some point on Puget Sound.

Maps of definite location of the portion of the main line from Kalama north to Tacoma were filed in 1873 and 1874, and for the portion from Kalama south to Portland in 1882, and the road thus located was constructed. The part of the projected main line between Pasco and Portland was not definitely located or constructed, and the grant pertaining to it was forfeited by the act of September 29, 1890, 26 Stat. 496. Maps of definite location of the branch from Pasco to Tacoma were filed in 1883 and 1884. Since under both the act and the resolution the terminus of the main line was at Puget Sound, the net result of all this was that physically and legally the Pasco-Tacoma route became part of the [691] main line, and the Tacoma-Portland route a branch.

At first blush the simple reference to the privileges, grants and duties of the 1864 act seems to constitute a rather slender expression of an intent to grant lands in aid of the extension from Portland to Tacoma. That such was the purpose and effect, however, is easily discernible in the debates, and, moreover, is shown by comparison with the joint resolution of April 10, 1869, 16 Stat. 57, granting to the Northern Pacific a right of way to build this very line, but providing that the company should

not be entitled to any subsidy in money, bonds or additional lands in respect of such extension. While there is no doubt of the intent, it may be observed that United States v. Northern Pacific Railroad Company, 193 U. S. 1, to which I shall hereafter refer, recognizes it. A precedent for the incorporation of a grant by reference to an earlier grant may be found in the statutes involved in United States v. Southern Pacific Railroad Company, 146 U. S. 570, where a grant to the Southern Pacific for an additional line was made by reference to a previous grant to the same company for another line. By reference to the 1864 act, therefore, Congress granted to the company, in aid of the portion of the extended line from Portland to Puget Sound, the odd-numbered sections in a quadrilateral twenty miles on each side of that line in the state of Oregon and a quadrilateral forty miles on each side in the Territory of Washington, with a ten mile indemnity belt for general losses and a fifty mile indemnity belt, measured from the line of the road, for mineral losses.

As appears in the discussion of the 1864 grant, the joint resolution of 1870 provided a second indemnity belt for satisfaction of losses to the amount suffered subsequent to July 2, 1864, [692] in any state or territory where the first indemnity belt was insufficient to meet the losses at date of final location in the particular state or territory. Should that apply to the newly subsidized extension from Portland to Tacoma? Plaintiff urges that it should

not; that Congress intended to provide second indemnity only to take care of situations where, in the interval between 1864 and 1870, settlers had gone in and depleted the limits originally prescribed. There would be great force in the argument if it were not that the resolution plainly provides otherwise. The second indemnity provision is set out in full at page 2 of this report. The phrase "said main line" where it twice occurs, refers back, both grammatically and logically, to the "main road to some point on Puget Sound, via the valley of the Columbia River." No distinction is made between the old main line and the new. It therefore seems clear that the resolution authorized second indemnity opposite the new line, provided, of course, the lands in first indemnity, at the time of final location in the particular state or territory, Oregon or Washington, were insufficient to supply the losses.

The United States refers at length to the debates in the Senate and House to show that the purpose of the new belt was to provide indemnity for losses opposite only the 1864 line. Recent decisions appear to authorize resort to the debates to ascertain intent, with increased liberality; but, still, where, as here, the language is unambiguous, there is no excuse for going outside the terms of the statute itself.

The Commissioner was so instructed by First Assistant Secretary Pierce in Northern Pacific Railway Company (Nov. 24, 1908) 37 L. D. 272. Plaintiff claims that the Assistant Secretary's opinion is obiter. Supposing so, I reach the same conclusion independently of it. [693]

II. Tacoma Overlap.

The line from Portland and the branch over the Cascades, as located and constructed, met at Tacoma at practically right angles, thereby creating a quadrant southeast of Tacoma, in which the 1870 grant is said to overlap the earlier, hence the "Tacoma Overlap", which presents the major question in the 1870 grant, N. P. exhibit 142, or, more conveniently, the small sketch accompanying it, shows the situation.

Two fundamental principles established by the courts as between senior and junior grants to different companies should be stated. First, when the senior grantee definitely locates its line, the lands within the place limits as thus determined pass to that grantee by relation as of the date of the grant. So, likewise, in the case of the junior grantee, its definite location relates back to the date of its grant. It therefore follows that the senior grant takes the land to the exclusion of the junior grant. This result is not at all affected by the respective dates of definite location. "Congress intends no scramble between companies for the grasping of titles by priority of location." Mr. Justice Brewer in United States v. Southern Pacific Railroad Company, 146 U. S. 570, 597-598. Second, if the junior grant should contain indemnity provisions such as those in both the Northern Pacific grants, then the lands within the overlap would be lost to the junior grantee, and it might have indemnity therefor.

Now the precise point to the Tacoma Overlap question is whether these principles apply in a

senior and a junior grant to the same company, there being no explanatory or declaratory language in either grant upon the subject. In other words, as a bare matter of [694] interpretation of the language of the two grants, may the Northern Pacific, because of this overlap, claim a right to indemnity in behalf of the Portland-Tacoma road under the grant of 1870, because it got the lands for the Cascade route under the grant of 1864 and so could not get them again.

Counsel on each side cite certain cases claimed to require a determination of this question one way or the other. I shall, therefore, first examine those cases.

Judge Biggs puts in the forefront what are called the Barney cases, 6 Fed. 802; 113 U. S. 618; 24 Fed. 889; 117 U. S. 228. The facts as stated by the court are many and complicated. No good purpose would be served by restating them. So far as any question here is concerned, the substance of those cases is about as follows: Congress had made a grant to the territory of Minnesota to aid in the construction of a railroad running generally easterly and westerly. The benefit of that grant ultimately came to the Winona and St. Peter Railroad Company. By the same act it granted other lands for a road running northerly and southerly, which ultimately got into the hands of the Minnesota Central, crossing the Winona and St. Peter. Both lines were definitely located. The Winona and St. Peter was built to a point in each direction beyond the

crossing, and I infer, but am not certain, that so was the Minnesota Central. By a subsequent act Congress granted to the state, for the benefit of these and other railroads, an additional four sections per mile, excepting certain lands, however, in these words (113 U. S. 621);

> "That any lands which may have been granted to the Territory or State of Minnesota for the purpose of aiding in the construction of any railroad, which lands may be located within the limits of this extension of said grant or grants, shall be deducted from the full quantity of lands hereby granted." [695]

49½ miles of the Winona and St. Peter were constructed before the additional grant, 53 39/100 after. So far as of importance here the litigation turned on what was thus excepted from the grant. Mr. Justice Field, in writing the opinion on the first appeal, said (113 U. S. 628):

> "The reservation of the lands previously granted to Minnesota from the grant of the additional four sections, that is, from the extension of the original grant of 1857, was only a legislative declaration of that which the law would have pronounced independently of it. Previous grants of the same property would necessarily be excluded from subsequent ones."

I am not at all certain that I understand the Barney cases. Counsel on each side profess to know all about what they mean and what they hold, and

will doubtless be able to aid Your Honor in understanding them. I should dislike very much, however, to base an opinion upon the Barney case. As I gather, they declare the rule that where lands have been granted to one road, a subsequent grant to another road does not include the previously granted lands. This, of course, must be so; but the question remains, notwithstanding the previous grant, might not the second grant be so phrased as to provide that, because certain lands had been previously granted to another road, the road receiving the second grant might have indemnity on account of the loss? So far as I can make out, the cases throw no light whatever upon that subject, and, therefore, do not give much aid in reaching a conclusion as to the Tacoma Overlap.

United States v. Oregon and California Railroad Company 164 U. S. 526, comes nearer to the mark, but still does not reach precisely the question. There a grant had been made which ultimately came into the hands of the Oregon and California. The grant was to aid the construction of a main line from Portland to Astoria, [696] and of a branch line from a junction at or near Forest Grove on the main line southerly to the Yamhill River at McMinnville. Both main and branch lines were definitely located. The main line, however, was built only to a point near Forest Grove, and subsequently the remainder of the main line grant was forfeited. The branch from near Forest Grove to McMinnville was built. The suit was to quiet title to lands fall-

ing within the northwest quadrant at the junction between the located main line and the constructed branch. The court held the main line absorbed the grant within its place limits, and that within those limits, therefore, the branch line received nothing. This is not a full statement of the case but it seems to be sufficient for any purpose here. In the report is a plat illustrating the situation. While the grant contained an indemnity provision no claim was made under it. The single question was whether the place lands on the main line went to that road to the exclusion of the branch line. Now there are two features distinguishing that case from this. The first is that the grant was by a single act, and, therefore, had to be construed as a single grant, and the second, that no indemnity question was presented. Had the branch line admitted that it did not earn any place lands within the primary limits of the main line, and sought indemnity therefor, the question in that respect would have been the same as here. While, therefore, this case is not controlling, it has a certain persuasive force. It recognizes the principle that Congress, by the general terms of the act, did not intend to make two grants of the same lands to the same company, holding that the lands within the overlap were absorbed by the main line location and that the branch line got nothing within the conflict. The Court of Appeals for this Circuit had held the contrary, but the judgment was reversed. The [697] Supreme Court relied somewhat for its conclusion upon the doctrine of

strict construction of governmental grants, and quoted approvingly the following language from Mr. Justice Harlan in Sioux City & St. Paul Railroad Company v. United States, 159 U. S. 349, 360:

> "If the terms of an act of Congress, granting public lands, 'admit of different meanings, one of extension and the other of limitation, they must be accepted in a sense favorable to the grantor. And if rights claimed under the government be set up against it, they must be so clearly defined that there can be no question of the purpose of Congress to confer them.' Leavenworth &c. Railroad v. United States, 92 U. S. 733, 740. Acts of this character must receive such construction 'as will carry out the intent of Congress, however difficult it might be to give the full effect to the language used if the grants were by instruments of private conveyance.' Winona & St. Peter Railroad v. Barney, 113 U. S. 618, 625. 'Nothing is better settled,' this court has said, 'than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or absurd conclusion.' Lau Ow Bew v. United States, 144 U. S. 47, 59.
>
> Giving effect to these rules of statutory interpretation, we cannot suppose that congress intended that the railroad company should have the benefit of more lands than it earned."

Plaintiff insists that under the doctrine in pari materia the two grants to the Northern Pacific

should be considered together as one grant. Of course, they must be construed with reference to one another, but neither the pari materia rule nor any other doctrine can obscure the fact that one grant was in 1864 and the other in 1870, and consideration of the two acts with reference to each other must keep that fact in view and give it whatever weight it may be entitled to under all the circumstances.

Mr. Frost put in evidence the record in the Forest Reserve case and claims that the measure of the grant of 1864, as stated by Mr. Justice Van Devanter, is res adjudicata. I must suppose that counsel has overlooked the circumstance that there was no final [698] judgment in the Forest Reserve case. There had been a judgment in the lower court, which was reversed, and there the matter ended. Of course, there could be no adjudication without a judgment. To adjudicate is to adjudge. Counsel do not claim that it is res adjudicata as to the 1870 grant, but maintain rather than the principles, the rules, there announced govern the 1870 grant in precisely the same manner as that of 1864. Naturally, that is true in so far as the same question may arise under the two grants. The Tacoma Overlap, however, did not, and could not, come up in the 1864 grant, and there was no occasion for the court, therefore, to say anything about it. Indeed, I doubt if the Supreme Court had ever heard of the Tacoma Overlap. It is true that the Jones adjustment was in the record and that computation shows the lands

within the overlap were excluded from the area of 1870 grant; but no question about it was presented. In fact, there was no question anywhere about it, as I shall point out presently. The Supreme Court laid down rules for the admeasurement of the 1864 grant, where there was no overlap, and therefore, of course, no overlap question. The overlap resulted from the grant of 1870 and must necessarily be taken into account in determining the measure of that grant. I am not overlooking the doctrine that the decision in the Forest Reserve case, and the grounds of it, became the law of the case in all subsequent steps taken therein. But this is a very different thing from the doctrine of res adjudicata. I think the Forest Reserve case has nothing to do with the Tacoma Overlap.

Defendant strongly insists upon the opinion of Secretary Noble in Chicago, St. Paul, Minneapolis & Omaha Railway Company (Oct. 11, 1889) 9 L. D. 483, 486. I do not understand the facts of that case. There is not enough stated in the opinion to enable [699] anyone to understand it. The point came up as one of many instructions to the Commissioner upon the adjustment of the grant to that road. To go back to the statutes and then have before me the record in the case, if that were possible, and to understand the adjustment of that grant so as to build up thence a conclusion as to what Mr. Noble meant by his decision, or by his language, or come to any clear comprehension of the case, would require as much labor as to decide the present ques-

tion now; and to do this would extend the report beyond any permissible length. If Mr. Noble meant to say that by some recognized rule of construction the intention of Congress was plain, then I should have no quarrel whatever with his conclusion on the point. But he does not inform us how he arrives at the intention of Congress. He simply states it. If he meant to say by the declaration, "no technical rules of law or adroit schemes of adjustment should be permitted to calculate the beneficiaries of Congress out of the bounty intended for them", he had disregarded established rules of law in arriving at the intention of the legislature, then I should decline to follow him. He nowhere informs what technical rules of law he had in mind, nor what the adroit schemes of adjustment may have been. I feel bound to say as to this case, therefore, that I presume it was correctly decided on the facts before the Secretary, but that I have no possible means of knowing whether those facts are sufficiently like the facts in the Northern Pacific grants to justify the use of the opinion as a precedent. Nothing in the opinion lays down any general legal principles which might throw light upon the construction of the Northern Pacific grants. I, therefore, as I did with the Barney cases, lay it to one side. [700]

United States v. Northern Pacific Railroad Company, 193 U. S. 1, is clear, intelligible and easily understood. The court held that as the Northern Pacific had never definitely located its line down the Columbia to Portland, and as it had been for-

feited, nothing stood in the way of the grant of 1870 taking the land. The imaginary overlap had nothing to do with it. The whole case there turned on the question whether there was a conflict between the two grants. Counsel, recognizing this, constructed a theory that Nature definitely located the line down the Columbia, thus conveniently relieving the company of the necessity. The court rather curtly disposed of that theory and held, there having been no definite location for the earlier grant, there was no overlap.

So, also, Northern Pacific Railway Co. v. De Lacey, 174 U. S. 622, declares only that the grant of 1864 conferred the land rights upon the branch over the Cascades, and that this grant was not superseded by the resolution of 1870. Had the branch over the Cascades never been definitely located or built to Tacoma, then there would have been no Tacoma Overlap, and undoubtedly the 1870 grant would have carried the land to the Northern Pacific, as it did at Portland. I should have no trouble, without those authorities, in holding the same thing; but obviously the question here is altogether a different one. The Cascade branch was built, the Portland line was built, and the two coming together at right angles created the overlap.

I have diligently sought to obtain some clue to the intention of Congress as to this question other than the language employed. I have not been able to find anything worth much.

The Congress in 1870, elected in 1868, was overwhelmingly in control of men who believed in exten-

sive railroad building and [701] land grants to aid. Public opinion, however, upon this question was rapidly changing. Already Congressmen doubtless heard the mutterings resulting in the Granger movement of the early 70s, which was largely responsible for the close election of 1876. There is discernible in the debates a strong, sometimes even a bitter, opposition to the grant of 1870. The question of an overlap in the two grants apparently never occurred to any one. Counsel have diligently gathered up the debates in both Houses over other features of the resolution, but have cited me to nothing on that phase. Mr. Davenport, examining the debates, is unable to find any reference whatever to the subject. This is strange because, had the lines been built as authorized, an overlap was certain to occur at or near Portland, and there might, indeed probably would be, one at Puget Sound, depending upon whether the termini of the Cascade branch and the Portland-Tacoma line should be fixed at the same point. It seems almost certain, had it entered the mind of any debater, that this question might come up, and that it might be claimed that there was a double grant, both at the point near Portland and at the common terminus of the two roads on Puget Sound, the opposition would have stressed it. It is difficult for me to comprehend how it could have been overlooked. It can be accounted for only in one of two ways—either that no one in Congress, at least no one of the minority, ever thought of the question; or else that no one supposed the con-

tention now put forward by the company could ever be made; in other words, the opposition must have supposed that the frame of the resolution did not by any possibility permit a construction allowing a double grant at the two points of junction. Any inference drawn from this circumstance is so indefinite and uncertain that I should not care to rely upon it as showing congression- [702] al intent. I only mention it in passing as a rather curious circumstance of uncertain bearing.

So I feel bound to come to a decision upon principle, as I find no authorities which serve as a precedent, nor other clue. We are left without any aid except the language employed, and, after all, the old-time rule of taking the language as it stands and interpreting it is the safest guide.

One is likely to be misled by the phrase often used in the testimony "lost to the grant". One gets an impression from the use of that term that "lost to the grant" refers to the loss without reference to the grantee. What that phrase means is that when lands within the place limits intended for the grantee by the granting act could not be obtained by it because of certain reasons stated in the act, the grantee had lost them. The phrase "lost to the grant" is purely a bookkeeper's term, intended to express this legal conception. Frequently, too, the phrase "lost to settlers" is used, meaning, of course, lost to the grantee because of settlement. Of course, where the grants are to different companies this construction is without importance; but here, where

both grants are to the same company, it may have some bearing.

As noted above, the grant of 1870 was in these words:

> "To locate and construct, under the provisions and with the privileges, grants, and duties provided for in its act of incorporation * * *."

Of this clause two things are to be noted. The first is, in the language of Mr. Justice Brewer in United States v. Southern Pacific Railroad Company, 146 U. S. 570, 595:

> "It matters not that the act of 1871 in terms purports to bestow the same rights, grants, and privileges as were granted to the Southern Pacific Railroad Company by the act of 1866. That merely defines the extent of the grant and the character of the rights and privileges; [703] it does not operate to make the latter grant take effect by relation as of the date of the prior grant, and thus subject the grants to the two companies to the rule controlling contemporaneous grants * * *."

In the next place, the clause does not undertake to include in the grant of 1870 any words or phrases from the grant of 1864. It merely confers the same privileges and grants, and imposes the same duties, as were conferred and imposed in the act. Whatever was conferred or imposed in the parent grant, as determined by the court where necessary, was transferred in exactly the same sense and to the

same effect to the junior grant. It is as though the resolution in this respect had been a part of the grant of Section 3 of the act of 1864. It to my mind, therefore, is perfectly obvious that, when we have determined the significance and effect of the original grant, we have determined the meaning and effect of the supplementary grant in the joint resolution.

By the act of 1864 indemnity was provided

> "whenever prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preempted, or otherwise disposed of * * *."

The term "shall have been granted" obviously means granted to somebody other than the Northern Pacific. So the term "or otherwise disposed of" refers to a disposition to some person other than the Northern Pacific. There was no Northern Pacific until the act making the grant created it. Therefore it cannot be disputed that the phrase means what I have just said. This aside, however, the whole construction and intent of this indemnity provision is just this and nothing more: "We have granted you, the Northern Pacific," say the United States, "certain lands, but we do not know, by the time you make definite location of your line, whether those lands will be available or not. Homesteaders and preemptioners [704] may have taken some of it; we may have reserved some portion; we may have granted some portion, or in some other way

have disposed of it, so that you cannot obtain it, therefore you may have indemnity in lieu of the lands that you have thus lost."

So when the joint resolution was passed, the United States was made to say to the Northern Pacific, as to the Portland-Tacoma line, precisely the same thing it had said in the act of 1864, no other or different. I repeat, the resolution did not adopt the language of the act. It adopted the result, the legal effect of that language. To put it another way, whatever resulted from the granting and indemnity provisions of the act of 1864 likewise resulted from the grant of 1870, no more, no less, no other and no different. I cannot comprehend reasoning by which it is sought to be maintained that when the privileges, grants and duties of the act of 1864 were applied to the new road they took on any new, or additional or different sense. If I am right, then it follows, of course, that the terms "shall have been granted * * * or otherwise disposed of" mean just what they meant in the Act of 1864, no more, no less, and therefore they do not, and cannot by any possibility, include a previous grant to the Northern Pacific or a previous disposition to the Northern Pacific.

The argument of counsel for the company comes just to this, that because the government had already granted these lands to the Northern Pacific, they should be treated as "shall have been granted" in the joint resolution of 1870, although not possibly so to be interpreted in the Act of 1864; and because

the Northern Pacific did not get them a second time, it should have indemnity for them now. Certainly, Congress might have so phrased the resolution of 1870 as to make it mean that, but it is to my [705] mind so clear that they did not do so that argument will add nothing to the conclusion. What, obviously, Congress meant to say by the joint resolution is "If you will build this line from Portland to Tacoma, we will make you a grant of land in the same quantity per mile and on the same terms and conditions we have already granted you by the act of 1864, but if by reservation or grant to some third person or through settlement under the land laws of the United States, you do not get that land, you may have indemnity therefor." The most latitudinary construction even could not make out of the language employed anything more. The United States said to the Northern Pacific, "If you will build this line, we will grant you this land; we will give you indemnity for losses along the line to third persons; but likewise, if by the location of your line across the Cascades you already get it, we will not give you indemnity because you did not get it a second time."

It is unnecessary in the view I take of this question to invoke the doctrine of strict construction. The most liberal rule would not carry the grant, as claimed, to the company; but most assuredly it cannot be reasonably insisted that there is not a great and besetting doubt as to whether the result claimed was intended by Congress.

> "If the terms * * * 'admit of different meanings, one of extension and the other of limitation, they must be accepted in a sense favorable to the grantor.' "

No reasonable, I might say no possible, argument can be made that the claim under the joint resolution does not come squarely in letter and spirit within the quoted language.

The views expressed above receive strong confirmation from the action both of the Interior Department and of the company [706] with respect to the lands in this overlap. In the Jones adjustment of 1906 the lands were excluded from the grant of the joint resolution. In the tentative adjustment (Govt. exhibit 66) transmitted to the Attorney-General, the forester and the company December 19, 1923, the overlap area is not deducted from the measure of the grant. Following the forester's brief the area was deducted and the deduction is shown in the Commissioner's report to the Joint Committee of Congress. In all subsequent action or opinion by the Department, the deduction has been maintained. There is no proof before me that the company made any objection until the hearings before the Joint Committee of Congress. There is no evidence that at any time before those hearings it put forward any claim to be entitled to have indemnity for the lands within the overlap. When the Cascade branch was located in 1884, the state of the grant under the joint resolution was fixed. If indemnity might be had for these lands as now

claimed, the grant was deficient, and a second indemnity belt should have been laid down. If, on the other hand, indemnity could not be had, then there was no deficiency authorizing second indemnity limits. Apparently neither the government nor the company ever thought of laying down a second indemnity belt until 1906. There is no proof that the company asked for one and no proof that the government ever considered it. Explanations are offered as to how it came to be done in 1906. The Jones adjustment prepared in that year indicated a deficiency in the state of Washington under the grant of 1870, and counsel for the government surmise that the Land Office thereupon erroneously laid down the second indemnity limits for that state without considering that the authority for it should have been governed by the status of the grant, not at the time of the adjustment, but at the date of final location. [707] Counsel for the railway surmise, likewise, that the Land Office laid down the limits because it considered the Tacoma Overlap a loss, and hence that the grant was deficient at final location. I do not know if either explanation is correct, but somehow or other the second indemnity belt was laid down in the state of 1906.

Now, as already said, the company became entitled to indemnity in this overlap, if ever, upon the final location of the Cascade branch, and yet from that time forward it has never tendered as a loss to the 1870 grant any of the lands within the overlap. It never sought in any way to obtain

indemnity for these lands or any of them, though during that whole period there were surveyed free lands in first indemnity, and afterwards in second indemnity, available for selection for such loss. It cannot be said, either, that this was an oversight. Some 30,000 acres of overlap lands were lost to settlers. Indemnity selections were promptly made for the lands so lost, the selections being in the indemnity limits of the grant of 1864 for all but 1792 acres, which were selected in the indemnity limits of the 1870 grant or in indemnity limits common to both grants; and all of that except 40 acres was selected at a time when the two grants were not being administered separately, and, as indicated, even the 40 acres was lost to settlers. Not an acre was tendered as base for indemnity by reason of having been taken by the prior grant.

It is impossible for me to believe that, had the Northern Pacific supposed it was entitled to indemnity for these lands because of the prior grant, that is, entitled to get twice as much land because of the two roads, as it had gotten by the one road, it would have laid by through all these years and never asserted the right. It is conduct that would be inexplicable if applied to any [708] one else; if applied to a private citizen, I should say, or any other sort of a corporation; it is doubly inexplicable when applied to this defendant, because throughout its long career it hastened, sometimes precipitately and to its own advantage, to make lieu selections. Even in this overlap it tendered for indemnity every acre

taken by settlers as base under one grant or the other, but not one acre did it tender as lost to the junior grant by reason of belonging to the senior.

Mr. Frost asserts that there was no occasion to tender overlap losses, as there was always an abundance of losses from other claims to take up such indemnity land as was from time to time available. He, of course, was not counsel during that period, and what he offers as explanation is only his present best theory upon the subject. It is possible to suppose that it may have so happened, but it is so improbable as to put the supposition beyond the bounds of reasonable inference. I think the true explanation is the apparent one—that through all those years the company was not claiming this indemnity.

I conclude, therefore, upon consideration of all that bears on the subject, that the lands within the Tacoma Overlap can not be regarded as "lost", and that in consequence indemnity may not be had for them.

III. Minor Questions.

8,568.29 acres were selected in the indemnity limits under lieu or relief acts. I held under the 1864 grant that the company should not be charged, or as it says, charged a second time for such selections. The same ruling applies here, of course. [709]

80 acres of unsurveyed lands lie in first indemnity, outside reserves. I hold this should be charged for the purpose of the adjustment, and ultimately patented.

IV. Substitution of Losses.

As a result of my conclusion upon the overlap, there was no deficiency in the state of Washington at the date of the railway's last definite location. That is, at that date there were in the place and first indemnity limits in Washington, unappropriated, "the amount of lands per mile granted by Congress within the limits prescribed by its charter". Hence the condition did not happen for laying down second indemnity limits in that state, and no occasion for substitution exists. Even should I be in error on the overlap, so that second indemnity is proper, still, strictly there is no need of substitution, for there is vacant mineral indemnity to meet the unsatisfied mineral losses, and, as I have said, any unsatisfied prior losses may be used in second indemnity directly without the mechanism of substitution. Should it appear that substitution would enable the railway to utilize any of its losses not otherwise susceptible of use, I hold that it may be allowed under the principles established with respect to the 1864 gant.

28,436.14 acres of losses were used to select lands in indemnity limits of the 1864 grant. That quantity was charged to the adjustment of the 1864 grant, and has been credited to the 1870 grant. This addition to the 1870 losses will not, however, aid the grant, for, as will next appear, there is no place to satisfy it. [710]

V. Availability of Withdrawn Lands for Indemnity Selections.

Upon the rulings now made the deficiency under the grant of 1870 may be stated thus:

		Acres
Deficiency as calculated by plaintiff		572,724.18
Add: Selections under lieu acts		8,568.29
Deficiency:		581,292.47
The same result is reached by reference to the deficiency as calculated by defendants, or		1,218,953.46
Less: Unsurveyed in first indemnity	80.	
Tacoma Overlap	637,580.99	637,660.99
Deficiency:		581,292.47

The unsatisfied losses are (N. P. exhibit 141, revised):

Unsatisfied prior losses	788,726.83	
Less: Tacoma Overlap	637,580.99	151,145.84
Unsatisfied subsequent losses:		
Washington	122,791.21	
Oregon	278,060.93	400,852.14
		551,997.98
Add: 1870 losses used in selections in 1864 limits		28,436.14
		580,434.12

As noticed under the 1864 grant, and for the reasons stated there, the unsatisfied losses do not exactly equal the calculated deficiency, but they do approximately. [711]

The withdrawn lands are as follows:

Grant of 1864

Second Indemnity Limits

Washington

Govt. Ex.	Date	Purpose	Acres	Acres
220	March 1, 1898	Forest	199,608.18	
221	Dec. 18, 1902	"	11,160.	
222	Aug. 27, 1906	"	2,233.48	213,001.66
		First Indemnity Limits		
		Washington		
223	March 1, 1898	Forest	127,595.81	
224	Dec. 18, 1902	"	22,538.98	
225	Aug. 27, 1906	"	5,120.	
226	July 2, 1910	Power	393.05	
227	Dec. 15, 1913	"	80.	155,727.84
	Total withdrawn, Grant of 1870			368,729.50

It is evident that the withdrawn lands are not nearly sufficient to meet the unsatisfied losses. Vacant lands outside reserves are comparatively negligible. Nevertheless, the condition for laying down second indemnity limits in Washington not having happened, the lands within those limits may not be used in reduction of the deficiency. They were never rightfully available for selection, and, of course, the forest withdrawals therein are valid and the company can not have compensation for any of them.

Though there was no deficiency in Washington at final location, there was in the grant as a whole.

All the place lands in Oregon had been lost to the grant, the deficit in that state exceeding the surplus in Washington. The deficiency in the grant as a whole has always existed, so that under the Forest Reserve rule all the withdrawals in first indemnity were invalid, and the company may have compensation for them. This is true even if mineral and unsurveyed lands, as well as lands actually available, be counted. [712]

The statements show that the company has received patents for 1,191.59 acres within second indemnity in Washington. I must regard these lands as within the same category as lands erroneously patented under the 1864 grant. The company may keep them and they should be charged to the grant.

I believe that any incidental questions not specifically mentioned fall within the rulings under the other grant.

Findings and Conclusions.

The order of reference directs me to report to Your Honor findings of fact and conclusions of law. Counsel evidently interpret that direction as calling for formal findings and conclusions because they have filed with me numerous requests. I shall, therefore, so treat the order. I wish it to be distinctly understood, however, that if anything in these findings or conclusions seems to be, because of their necessary brevity or otherwise, in conflict with or in modification of anything said in the body of the report, it is not intended. I wish them interpreted with reference to the extended discussion of the several questions.

As each of the subjects discussed by counsel and covered in the body of the report herewith transmitted is to a great degree separate and distinct from all others, I have thought it wise so far to depart from the general practice as to state the findings, followed by the conclusions, on each subject. This course saves much repetition and puts in concrete form the findings and conclusions on each subject. References are to pages of the report: [713]

Grant of July 2, 1864.

I.

Portage Conflict (page 725.)

The facts are:

(a) From Ashland, Wisconsin, to Superior, Wisconsin, the route of Northern Pacific Railroad Company, as authorized by the act of July 2, 1864, is upon the line of the railroad route of Portage, Winnebago & Superior Railroad Company, to aid in the construction of which lands had been theretofore granted by the United States.

(b) As far as the routes are upon the same general line the amount of land so granted was 347,141.24 acres, indicated as Area A upon Govt. Exhibit 76.

(c) The route of Northern Pacific Railroad Company is not upon the same general line as the portions of the route of said Portage Company to aid in the construction of which Areas B and C, shown on said exhibit, were granted.

The conclusions are:

(a) The quantity of 347,141.24 acres should be deducted from the amount of lands granted by the act, and the lands selected in lieu thereof should be charged to the grant as lands erroneously patented.

(b) No deduction should be made on account of Areas B and C.

II.

Montana Place Error (page 729.)

The fact is:

Through error in survey certain odd-numbered sections in place limits in Montana contain more than 640 acres, the excess aggregating 5,435.46 acres. [714]

The conclusion is:

This quantity should be charged to the grant as lands erroneously patented.

III.

Lieu Selections (page 732.)

The facts are:

Under the act of July 1, 1898, and other acts for the relief of settlers, defendants selected 38,485.23 acres in indemnity limits in lieu of lands relinquished. The lieu selection rights by virtue of which such selections were made were charged to defendants.

The conclusion is:

No charge should be made by reason of such selections.

IV.

Quantity of Deficiency (page 736.)

The deficiency in the grant is 2,220,224.17 acres.

V.

"Agricultural Lands" (page 738.)

The facts are:

(a) The lands in first indemnity limits and mineral indemnity limits, respectively, within Government reservations, described in N. P. exhibits 144 and 146, for which mineral base is assigned on direct selection, are not agricultural lands in the sense that they are tillable, except those listed on page 41, which are tillable. They are not mineral lands, and are not iron or coal.

(b) The lands in first indemnity limits described in N. P. exhibit 145, for which mineral base is assigned in substitution for subsequent losses originally used, are not mineral lands, patents having issued therefor upon the original selections. They are not iron or coal. [715]

The conclusions are:

(a) The phrase "agricultural lands" as used in Section 3 of the act of July 2, 1864, is intended to be used in opposition to the phrase "mineral lands" and to include all lands not mineral, and not iron, and not coal.

(b) The lands described in N. P. exhibits 144, 145 and 146 for which mineral base is assigned are of such character as to be selectable as indemnity for mineral losses.

Note: It is not readily ascertainable which, if any, of the lands described in said exhibits are included within the limits conceded to be mineral. Any such are excepted from this conclusion.

VI.

Absaroka and Beartooth Forest (page 765.)

The facts are:

(a) 314,544.05 acres within the Absaroka and Beartooth National Forests, and within the place limits of the grant, were part of the Crow Indian Reservation when the railroad line opposite them was definitely located.

(b) Said lands were restored to the public domain in 1882, and so remained until they were withdrawn for national forests.

The conclusion is:

Said lands are subject to the same rules as may apply to other withdrawn lands, within the principle of the Forest Reserve case.

VII.

Fort Ellis Lands (page 771.)

The facts are:

(a) 3,300.82 acres within the place limits of the grant were part of Fort Ellis Military Reservation when the railroad line opposite them was definitely located. [716]

(b) The reservation was thereafter abandoned.

(c) By act of April 13, 1891, the lands were made subject to entry under the general land and mining laws of the United States.

The conclusion is:

The lands were not restored to the public domain, and therefore were not selectable by the company as indemnity.

VIII.

Northern Cheyenne Indian Reservation (page 773.)

The facts are:

(a) 52,050.93 acres within first and second indemnity limits in Montana were reserved by the United States as part of the Northern Cheyenne Indian Reservation after the line of railroad opposite them was definitely located.

(b) The lands, when so reserved, were unoccupied and unappropriated public lands.

The conclusion is:

Northern Cheyenne Indian Reservation is a Government reservation within the meaning of Section 1 of the act of June 25, 1929, and the lands therein are therefore governed by the same rules as may apply to lands within national forests and other Government reservations.

IX.

Substitution of Losses (page 777.)

The facts are:

(a) By mistake in the printed Statutes at Large the words "and within fifty miles thereof" were omitted from the provision for indemnity for mineral losses in Section 3 of the act of July 2, 1864. [717]

(b) The error was discovered in 1904.

(c) Both the company and the officials of the Department of the Interior assumed the printed statute to be correct and that therefore indemnity for mineral losses could be selected without limit of distance from the line of the road.

(d) Acting upon the supposition the company used its general losses in first indemnity; whereas, but for the mistake, it would have used them in second indemnity, reserving mineral losses for first indemnity; and therefore by this mutual mistake the company was misled to its prejudice.

(e) The Secretary of the Interior had permitted, or had refused, substitution of base for reasons which appeared to him, in the exercise of his administrative discretion, to be sufficient.

(f) After the discovery of the error in the printing of the statute, the company filed three requests for substitution. The requests were denied.

(g) After such denial, Messrs. Britton & Gray, counsel for the company at Washington, D. C., in a communication to the secretary of the Interior, expressed the view that the action of the Department was reasonable.

The conclusions are:

(a) The Secretary of the Interior, in the exercise of administrative discretion, might properly permit or refuse substitution of base, as on occasion he did. Likewise the court, in the exercise of judicial discretion, in the application of established principles of equity, may permit or refuse it.

(b) The maxim "He who seeks equity must do equity" requires that the substitution proposed by N. P. exhibit 145 be allowed. [718]

(c) The mutual mistake as to the terms of the mineral indemnity proviso was not a mistake of law, but of fact, and is therefore correctible.

(d) The mistake should be corrected by permitting the company to withdraw its assigned general losses and substitute therefor mineral losses as proposed by said exhibit.

(e) The action of the company in making its several assignments of general losses was not an election, first, because the common-law doctrine of election is not applicable to these selections, and, second, because, if it were, the election was made under a mistake of fact and is not binding.

(f) After denial by the Department of its requests for substitution the company had no remedy, and did not acquiesce in the rejection of its requests.

(g) The letter from Messrs. Britton & Gray did not amount to nor evidence any acquiescence by the company in the general principle of the right of substitution, nor amount to more than a statement by counsel to the Secretary that they would pursue the matter no further before him. It could not have been said that after that letter was written the company could make of him no further requests for substitution, and it most certainly does not affect the company's right under the principle that the plaintiff must do equity.

X.

Availability of Withdrawn Lands for Indemnity Selections (page 819.)

The facts are:

(a) On March 1, 1898, prior to the withdrawals of that date for governmental purposes, the vacant surveyed nonmineral [719] lands within the indemnity limits of the grant of July 2, 1864, were insufficient to supply the unsatisfied losses in place, and that condition obtained until after all the withdrawals for governmental purposes within those limits had been made.

(b) A withdrawal of 5,120 acres was made for forest purposes February 3, 1892, and there is no proof that the grant was then deficient.

(c) On December 31, 1935, counting withdrawn lands, whether surveyed or unsurveyed, but excluding mineral, there was an excess of approximately 24000 acres.

(d) The vacant lands in second indemnity limits in Idaho, including withdrawn lands, together with selections heretofore made in said limits, exceed the subsequent losses in that state by approximately 30,000 acres.

Note: It must be left to counsel to ascertain exact acreage in this as in other instances. So also, in general, with matters of description.

The conclusions are:

(a) What may be selected as indemnity depends upon the state of the lands sought to be selected at the moment of choice; hence, neither mineral

lands nor unsurveyed lands could be taken in satisfaction of losses. In determining, therefore, whether the lands in indemnity limits were sufficient to supply the losses, neither mineral nor unsurveyed lands should be counted.

(b) All the withdrawals listed in Govt. exhibits 110, 111, 113, to 188, both inclusive, 152A, 161A, 184A, 184AA, 184B, 110A, 111B, 188A, 188B and 188C were invalid and ineffective as against the indemnity selection rights of the defendants, except as to 3,300.82 acres of abandoned Fort Ellis lands. [720]

(c) Northern Pacific Railway Company may designate and have compensation under the act of July 25, 1929, for all such withdrawn lands, with the exception just noted, to the extent of the deficiency as found, save that in second indemnity limits in Idaho it may not select, including valid selections heretofore made in said limits, more than the quantity of its subsequent losses in Idaho, and save that it may not select lands conceded to be mineral.

(d) In designating land for which it claims compensation, the railway need not specify a particular loss in place for each indemnity tract for which compensation is claimed.

XI.

Lands Patented to Homesteaders after Withdrawal.

The fact is:

3,710.31 acres within withdrawn lands were entered under the general homestead laws or by other

filings after withdrawal and prior to June 5, 1924, and patents therefor were subsequently issued to the applicants.

The conclusion is:

Since the withdrawals were invalid, the company should have compensation as though the lands remained in their withdrawn status and had not been patented. The principle applied to the Northern Cheyenne Indian allotments applies here. What the government did with the lands after they had been placed, by withdrawal, beyond the reach of the company, can have no effect whatever upon the company's rights.

Grant of May 31, 1870.

I.

Authorization of Second Indemnity Limits

(page 842.)

It is concluded the Joint Resolution of May 31, 1870, authorized the laying down of second indemnity limits in Washington in event of deficiency at final location. [721]

II.

Tacoma Overlap (page 846.)

The facts are:

637,580.99 acres in odd-numbered sections within the place limits of the grant of 1870 for the line from Portland to Puget Sound, southeast of Tacoma, were comprehended by the place limits of the grant of 1864 for the line from Pasco to Puget

Sound. Both lines were definitely located and were constructed.

The conclusion is:

The company is not entitled to indemnity for the lands which it got by the 1864 grant.

III.

Lieu selections (page 865.)

The fact is:

Under the act of July 1, 1898, and other acts for the relief of settlers, defendants selected 8,568.29 acres in indemnity limits in lieu of lands relinquished. The lieu selection rights by virtue of which such selections were made were charged to the grant.

The conclusion is:

No charge should be made by reason of such selections.

IV.

Eighty Acres (page 865.)

The fact is:

Eighty acres of first indemnity land outside Government reservations remain unsurveyed.

The conclusion is:

The land should be patented to the company and charged to the grant. [722]

V.

Quantity of Deficiency (page 867.)

The deficiency in the grant is 572,724.17 acres.

VI.

Availability of Withdrawn Lands for Indemnity Selections (page 867.)

The facts are:

(a) On final location in the Territory of Washington the vacant lands within the first indemnity limits were sufficient to supply the place losses.

(b) In 1906 second indemnity limits were laid down in Washington and 1,191.59 acres therein have been patented to the company. 200 acres additional have been selected.

(c) On final location in the grant as a whole the vacant lands within the indemnity limits of the grant were insufficient to supply the place losses, and that condition has since obtained.

The conclusions are:

(a) The second indemnity limits in Washington should not have been laid down, and the lands therein were never rightfully available for selection.

(b) 1,191.59 acres in second indemnity limits patented to the company should be retained by it and charged to the grant, the same principle applying as in the case of other lands erroneously patented. Selections of 200 acres of additional therein should be cancelled.

(c) All withdrawals in second indemnity limits are valid and defendants cannot have compensation for any thereof.

(d) All withdrawals in first indemnity limits listed in Govt. exhibits 223 to 227, both inclusive,

were invalid and in- [723] effective as against the indemnity selection rights of the defendants.

(e) Northern Pacific Railway Company may designate and have compensation under the act of July 25, 1929, for all withdrawn lands in first indemnity limits, except such as are conceded to be mineral, to apply upon the deficiency as found.

Both Grants.

I.

Lands Conceded to be Mineral

The facts are:

The following lands are mineral (other than coal and iron) and are excepted from the grant:

a. Those lands in the place limits in Montana listed and described on the schedule offered by the defendants and appearing on pages 587-589 of the transcript, aggregating 11,254.73 acres;

b. Those lands in the place limits in Idaho listed and described on the schedule offered by the defendants and appearing on pages 590-591 of the transcript, aggregating 21,208.07 acres;

c. Those lands in the place limits in Washington listed and described on the schedule offered by the defendants and appearing on pages 592-593 of the transcript, aggregating 3,210.30 acres;

d. Those lands in the second indemnity belt in Montana listed and described on the schedule offered by the defendants and appearing on page 598 of the transcript, aggregating 7,265.56 acres;

e. Those lands in the second indemnity belt in Idaho, aggregating 2,701.00 acres, and described as follows: [724]

	Sec.	T. N.	R. W.	Acres
"All	1	42	2	637.76
NE¼, N½ NW¼, SE¼ NW¼	11	42	2	280.00
All	31	43	2	623.24
S½ SE¼, NE¼ SE¼, SW¼, S½, NW¼, NW¼ NW¼	33	43	2	400.00
S½, NE¼, S½ NW¼, NE¼ NW¼	35	43	2	600.00
N½ NW¼, SE¼ NW¼, NW¼ NE¼	35	43	3	160.00

f. Those lands in the first indemnity belt in Idaho, aggregating 5,602.12 acres, and described as follows:

		N.	W.	
All	1	64	5	640.00
"	5	"	"	640.00
"	7	"	"	320.00
W½	9	"	"	320.00
E½	13	"	"	320.00
All	17	"	"	640.00
"	19	"	"	237.96
"	21	"	"	640.00
W½	27	"	"	320.00
All	29	"	"	640.00
"	31	"	"	244.16
"	33	"	"	640.00

g. Those lands listed and described on the schedule offered by the defendants, beginning on page 798 of the transcript, aggregating 92,276.70 acres;

h. Those lands listed and described on the schedule offered by defendants and appearing on page 890 of the transcript, aggregating 1,211.79 acres in the place limits of Washington under the grant of July 2, 1864, and 242.78 acres in place limits of Washington under the grant of 1870;

i. Those lands listed on the schedule offered by the defendants and appearing on page 1452 of the transcript, aggregating 1,035.41 acres.

Note: The lands mentioned in a, b, c, d, g, h and i were conceded by both sides during the taking of the testimony to be mineral. Those described in e and f were determined to be mineral by correspondence. I have filed as Govt. exhibit 302 a letter from Judge Biggs to me, dated May 24, 1937, enclosing copies of the [725] correspondence touching these items. Since the descriptions appear in part at various places in the transcript and in part have been determined by correspondence, and since item g, as it appears in the transcript does not show the acreage, I suggest that the parties file a stipulation describing the lands conceded to be mineral. Upon their doing so, this finding will be deemed to refer to the lands described in such stipulation.

II.

Lands Listed or Selected but not Patented.

The facts are:

The place lands described in N. P. exhibits 149-158, both inclusive, and the indemnity lands described in said exhibits for which nonmineral losses are assigned, are nonmineral lands. The indemnity lands described in said exhibits, for which mineral losses are assigned, are nonmineral lands, and are not iron or coal.

The conclusion is:

The railway company is entitled to patent for the lands described in said exhibits.

Note: Excepted from this conclusion are any of such lands as are conceded to be mineral.

The order also directs the special master to report recommendations for an order or decree. Counsel have not advised me what is expected in this respect. Indeed, they did not refer to the subject either in oral argument or in briefs. Still the direction is there, and I suppose I should pay some attention to it. The copy of the special statute of appeal in this case (I have not the date before me) uses the phrase "order or decree." So likewise is the direction in the reference. In equity practice the word "order" has always, and does still, refer to those short and [726] informal matters which are called to the court's attention in the progress of the cause. Formerly motions for such orders were made orally. They still are as to some matters, but are more usually in writing. The word "decree" in equity practice has always, and still does, refer to the more formal and solemn adjudication of the rights of the parties. This is as true of an interlocutory as of a final decree. Concrete to the case before us, I presume the word "order", as used in both the statute and the direction of reference, refers to Your Honor's action in sustaining or overruling exceptions which may be taken to this report, and to any other directions concerning it. The word "decree" obviously refers to an interlocutory decree to be made at this time. I suppose that decree should finally and fully adjudicate the rights of the parties in this case. It should, in form as well as in substance, wind up

this litigation and determine, once and for all, the respective rights of the government and the railroad under the grants of the company. It should, of course, leave open the question of any determination which may be necessary upon the subject of compensation to the company for lands in the governmental reserves retained by the United States. It is very closely analogous to a decree for the plaintiff in a patent right case, that decree leaving open only the subject of accounting for profits and damages for the infringement. I do not see that I am able to make any other suggestion on this point that would be helpful to Your Honor or to counsel. [727]

I certify that the five bound typewritten volumes of testimony, transmitted herewith, comprising 1481 pages, constitute a full, true and correct transcript of the testimony taken under the amended order of reference dated the 21st day of April, 1936, at Washington, D. C., April 28 to May 2, 1936, and at Spokane, Washington, June 15 to June 20, 1936, September 2 to 5, 1936, and January 27 to February 15, 1937, and that the exhibits transmitted herewith, being Government exhibits 66 to 301, both inclusive, and Northern Pacific exhibits 131 to 167A, both inclusive, and indexed in said volumes, are the exhibits admitted in evidence. Govt. exhibits 302 is the one stipulated by correspondence to which reference is made above.

Accompanying the exhibits in a separate envelope, are numerous documents, and a map, not introduced as exhibits, but submitted to me for con-

venience of reference. Also in a separate envelope, which I have marked N. P. exhibit 168, are the maps submitted by the railway company in support of its claim that lands for which it tendered mineral base in substitution are not iron lands, and correspondence pertaining thereto.

F. H. GRAVES,
Special Master.

[Endorsed]: Filed July 26, 1937. [728]

[Title of District Court and Cause.]

EXCEPTIONS OF DEFENDANTS, NORTHERN PACIFIC RAILWAY COMPANY, A CORPORATION, NORTHERN PACIFIC RAILROAD COMPANY, A CORPORATION, AND NORTHWESTERN IMPROVEMENT COMPANY, A CORPORATION.

Now comes the defendants Northern Pacific Railway Company, a corporation, Northern Pacific Railroad Company, a corporation, and Northwestern Improvement Company, a corporation, and take the following exceptions to the report of the Special Master, Honorable Frank H. Graves, filed with the clerk of this Court on July 26, 1937;

I.

The above named defendants except (a) to the finding (Report, pp. 143,30) that the route of the

Northern Pacific Railroad Company between Ashland, Wisconsin and Superior, Wisconsin, is upon the line of the railroad route of the Portage, Winnebago & Superior Railroad Company; (b) to the finding (Report, p. 143) that as far as the routes are upon the same general line the amount of land so granted to Portage, Winnebago & Superior Railroad Company was 347,141.24 acres; (c) to the conclusion (Report, pp. 143,30) that 347,141.24 acres should be deducted from the area of the grant to the Northern Pacific Railroad Company and that the lands selected in lieu thereof should be charged to the grant as lands erroneously patented; (d) to the finding (Report, p. 36) that the deficiency under the grant [729] of July 2, 1864 is 2,220,224.17 acres or any area less than 2,567,365.41 acres; (e) to the finding (Report, p. 37) that the unsatisfied losses in the hands of defendant Northern Pacific Railway Company are 2,269,707.75 acres or any quantity less than 2,616,848.99 acres.

II.

These defendants except (a) to the finding (Report, p. 152) that the deficiency in the grant of May 31, 1870 is only 572,724.17 acres or any area less than 1,218,953.46 acres; (b) to the finding (Report, p. 152) that on final location in the Territory of Washington of the line of railroad between Portland, Oregon and Tacoma, Washington the vacant lands within the first indemnity limits in Washington were sufficient to supply the place losses of the

grant for said line in said Territory; (c) to the conclusion (Report, p. 152) that the second indemnity limits in Washington should not have been laid down and that the lands therein were never rightfully available for selection; (d) to the conclusion (Report, p. 152) that all withdrawals for national forest reserves in said second indemnity limits are valid and that defendants can not have compensation for any of said lands; (e) to the conclusion (Report, p. 151) that the company is not entitled to indemnity under the grant of May 31, 1870 for the lands in the Tacoma Overlap which it got by the grant of July 2, 1864; (f) to the conclusion (Report, p. 152) that selections of 200 acres additional in second indemnity limits in Washington should be cancelled; (g) to the conclusion (Report, p. 138) that the lands within the Tacoma Overlap cannot be regarded as lost to the grant of May 31, 1870 and that indemnity may not be had for them; (h) to the finding (Report, p. 137) that had the Northern Pacific supposed it was entitled to indemnity under the grant of May 31, 1870 for the lands in Tacoma Overlap because of the prior grant, it would not have laid by through all the years and never [730] asserted the right; (i) to the finding (Report, p. 140) that the deficiency under the grant of May 31, 1870, is no more than 581,292.47 acres or any area less than 1,218,953.46 acres and that the unsatisfied losses in the hands of defendant Northern Pacific Railway Company are no more than 580,434.12 acres or any quantity less than 1,218,-

015.11 acres; (j) to the conclusion (Report, p. 141) that the condition for laying down second indemnity limits in Washington not having happened, the lands within those limits may not be used in reduction of the deficiency, that said lands were never rightfully available for selection, that the forest withdrawals therein are valid, and that the company cannot have compensation for any of said lands.

III.

These defendants except to the conclusion (Report, p. 10) that the losses to be satisfied within second indemnity limits of a particular State or Territory are restricted to those originating within the same State or Territory.

IV.

These defendants except to the conclusion (Report, pp. 108, 109) that the Government may reserve or appropriate to its own uses lands in the indemnity limits so long as that which remains is sufficient to meet all unsatisfied losses.

L. B. daPONTE
F. J. McKEVITT
D. R. FROST
Solicitors for defendants, Northern Pacific Railway Company, a corporation, Northern Pacific Railroad Company, a corporation, and Northwestern Improvement Company, a corporation.

[Endorsed]: Filed Aug. 9, 1937. [731]

[Title of District Court and Cause.]

SUPPLEMENTAL EXCEPTIONS OF DEFENDANTS.

Now comes the defendants, Northern Pacific Railway Company, Northern Pacific Railroad Company, and Northwestern Improvement Company, and in addition to the exceptions filed with the Clerk August 9, 1937, take the following exceptions to the report of the Special Master, Honorable Frank H. Graves, filed with the Clerk of this Court on July 26, 1937:

I.

The above named defendants except to the omission on page 105 of the report in the enumeration of withdrawals in first indemnity limits in Washington of that certain withdrawal of 799.95 acres of said Washington first indemnity lands for forest purposes on October 10, 1924, said area being described in detail in Northern Pacific Railway Exhibit 144 on page 10 thereof. Plaintiff in its exhibits showing the areas of lands withdrawn on December 31, 1935 included said 799.95 acres in the total area of withdrawals.

II.

The above named defendants except (a) to the finding (Report, p. 106) that 3300.82 acres of Fort Ellis lands are closed to selection; and (b) to the finding (Report, p. 106) that 92,276.70 acres of withdrawn lands are conceded to be mineral and are hence ineligible; and (c) to the finding (Report,

p. 106) that these deductions bring the total down to [732] about 2,244,000 acres. Said areas of 3300.82 acres of Fort Ellis lands and of 92,276.70 acres of conceded mineral lands are not described in any of the plaintiff's exhibits enumerated on pages 103, 104 and 105 of the report, and hence said areas are not included in any of the totals shown on said pages 103, 104 and 105.

L. B. daPONTE
D. R. FROST
F. J. McKEVITT
Solicitors for defendants, Northern Pacific Railway Company, Northern Pacific Railroad Company, and Northwestern Improvement Company.

[Endorsed]: Filed Aug. 11, 1937. [733]

[Title of District Court and Cause.]

EXCEPTIONS OF THE UNITED STATES TO THE REPORT OF THE SPECIAL MASTER FILED ON JULY 26, 1937.

[734]

Index

[735]

[Title of District Court and Cause.]

EXCEPTIONS TO THE MASTER'S REPORT

Comes now the plaintiff, and without waiving any of its exceptions to the former Report of the Master herein, or to the Order of the Court thereon, files the following exceptions to the report of the Special Master filed on July 26, 1937. All exceptions are to be deemed taken not only to the finding or conclusion specified, but to all findings and conclusions of like import in the general body of the report. (The transcript of evidence is referred to by the letters "Tr." followed by the page number. The Master's Report is referred to by the letter "p." followed by the page number.)

Portage Conflict

Exception No. 1.

The plaintiff excepts to the Master's finding of fact ((b) on page 143) of his report that "As far as the routes are upon the same general line the amount of land so granted was 347,141.24 acres, in- [736] dicated as Area A upon Govt. Exhibit 76" and to the Master's finding to the same effect in the body of his report (pp. 27-30) for the following reasons:

(a) The uncontradicted evidence is that 417,400.66 acres, as shown on Government Exhibit 76 and by the testimony of the witness Barber (Tr. 102) is the amount of land in place within the overlapping limits of the grant made by the Act of May 5, 1864, to Wisconsin for the benefit of the Portage, Winnebago & Superior

Railroad Company, and the grant made by the Act of July 2, 1864, to the Northern Pacific Railroad Company for that portion of its line from Ashland to Superior which this Court holds is upon the same general line of the route of the Portage Company and that this overlapping area of 417,400.66 acres should be deducted.

(b) The Master in his former report (p. 92) approved by the Court, held that no "title within the overlapping of these two roads ever passed to the Northern Pacific" and the Government contends the Master should have deducted the overlapping Areas of A, B and C, aggregating 417,400.66 acres.

Exception No. II.

The plaintiff excepts to the Master's finding of fact ((c) on page 143) of his report that "The route of Northern Pacific Railroad Company is not upon the same general line as the portions of the route of said Portage company to aid in the construction of which Areas B and C, shown on said exhibit, were granted" and to the Master's finding to the same effect in the body of the report (pp. 27-30), for the reason that this Court held in its former decree in this suit that [737] the Northern Pacific earned nothing for its line from Superior to Ashland in so far as the place limits of the portion of its road overlap or conflict with the place limits of the prior grant to the Portage Company. The

Areas B and C are within the place limits opposite the line from Ashland to Superior and within the place limits of the prior grant to the Portage Company.

Exception No. III.

The plaintiff excepts to the Master's conclusion of law ((a) on page 143) of his report that "The quantity of 347,141.24 acres should be deducted from the amount of lands granted by the act, and the lands selected in lieu thereof should be charged to the grant as lands erroneously patented," and to the Master's conclusion to the same effect in the body of the report (pp. 27-30), for the reason that the said conclusions are erroneous in that:

(a) The Court should have held that the deduction should be 417,400.66 acres, being the amount of overlapping lands within the place limits of that portion of the route of the Northern Pacific between Ashland and Superior and within the place limits of the prior grant to the Portage Company.

(b) The Court should have further held that since the Company acquired patents to these lands by the use of said alleged base (Exhibit R to the amended bill and Government Exhibits 76 and 289, Tr. 1409-1410), treating it as non-mineral base, although the overlapping area was not a loss to the grant, it is incumbent upon the Company now to assign valid, unused, non-mineral base for the lands so patented. The Master should have made his computation or findings as

though, and to the same effect as if, the non-mineral unused losses of the Company had been reduced to that extent.

(c) Mineral base cannot be used for the reason that the Company offered no evidence as to the non-coal, non-iron or agricultural [738] Character of these patented lands and there is no evidence in the record as to their character.

(d) The plaintiff did make an issue of the character of the losses thus required (See report, p. 30; plaintiff's brief, pp. 12-14), notwithstanding the statement of the Master on page 117 of his report.

Exception No. IV.

The plaintiff excepts to the Master's conclusion of law ((b) on page 143) of his report that "No deduction should be made on account of Area B and C" and to the Master's conclusion to the same effect in the body of the report (pp. 29-30), for the reason that said ruling is erroneous as set forth above in connection with Exception No. III to the Master's conclusion of law (a) on page 143.

Exception No. V.

The plaintiff excepts to the failure of the Master to find as a fact its request (2) for findings of fact as follows:

That the acreage of said three Areas A, B and C aggregating 417,400.66 acres in odd-numbered sections is the amount of land in place within the overlapping limits of the grant made by the Act of May 5, 1864, to Wisconsin for the

> benefit of the Portage, Winnebago & Superior Company, and the grant made by the Act of July 2, 1864 to the Northern Pacific for that portion of its line from Ashland to Superior.

for the reason that the facts stated in said requested findings are established by the uncontradicted evidence of the witness Wansleben (Tr. 63 to 69, describing Exhibit 76) and of the Witness Barber (Tr. 102).

Quantity of Deficiency

Exception No. VI.

The plaintiff excepts to the finding of the Master (p. 144) that "The deficiency in the grant is 2,220,224.17 acres" and to the like conclusion of the Master at page 36 of the report, for the reason said finding is erroneous in that it is based upon a deduction of only 347,141.24 acres on account of the overlapping of the primary limits of the Northern Pacific grant with the Portage grant whereas the de- [739] duction on account of such overlapping should have been 417,400.66 acres, for the reasons stated in Exceptions Nos. I and III.

Agricultural Lands

Exception No. VII.

The plaintiff excepts to the failure of the Master to find as requested by its forty-second request for findings of fact:

> That each and every tract of land described in Government Exhibits 237, 244 and 248 and which lands the Railway Company asks to se-

lect as indemnity for mineral loss as set forth in Northern Pacific Exhibits 144 and 146 are not agricultural lands, except those tracts listed in Columns 2, 3 and 4 of said Government Exhibits 237, 244 and 248.

The uncontradicted evidence covering pages 1106 to 1379 of the Record is to this effect. If the Court is of the opinion that the Master's finding of fact (a) on page 144 of his report is a finding in substance as above requested, then this exception becomes immaterial.

Exception No. VIII.

The plaintiff excepts to the Master's finding of fact (p. 45) that "From the beginning of the administration of this grant it was consistently the understanding of Land Commissioners and Secretaries of the Interior that the phrase (agricultural lands) was one of classification and was intended to mean, and it was held did mean, all lands not mineral in character", for the reason that:

(a) This finding is contrary to the evidence introduced by the Company in the form of a letter from E. C. Finney, First Assistant Secretary of the Interior, dated May 6, 1925 (Tr. 1472-1476), in which the Assistant Secretary stated: "I find no specific ruling of the department on this point".

(b) There is no evidence from which the Master could find that the phrase was understood to be one of classification, nor was there any ruling by the Commissioner of the General

Land Office or the Secretary of the Interior that it meant all lands not mineral in character. [740]

Exception No. IX.

The plaintiff excepts to the Master's finding of fact ((b) on page 144) that "The lands in first indemnity limits described in N. P. exhibit 145 (the Master probably means N. P. Exhibit 167), for which mineral base is assigned in substitution for subsequent losses originally used, are not mineral lands, patents having issued therefor upon the original selections. They are not iron or coal", and to the Master's finding to the same effect in the body of the report (pp. 58-59 and 97 to 101). The plaintiff excepts to the finding that these lands are not iron or coal for the reasons that:

(a) The sole evidence as to their coal character is the evidence of defendants' witness Schwarm, found on pages 634, 637 and 689 to 703 of the Transcript. The plaintiff objected and excepted to this evidence (Tr. 701-2) on the ground that the witness could not testify as to the contents of the geological reports without producing them and on the further ground that he was not an expert. The plaintiff relies upon these objections and exceptions.

(b) Even if the evidence of the witness Schwarm were competent, it has no probative value.

(c) As to the evidence of the iron character of these lands the only witness who testified as

to their iron character was the witness Schwarm (Tr. 690) and the Master finds on page 98 of his report that this evidence was insufficient to prove their non-iron character. The Master reaches his finding as to their non-iron character by examining certain publications listed on pages 98 to 101 of the report which were not offered in evidence, of which the Master could not take judicial notice, and which, in any event, do not show the non-iron character of these lands. [741]

Exception No. X.

The plaintiff excepts to the Master's conclusion of law ((a) on page 145) of his report that "The phrase 'agricultural lands' as used in section 3 of the Act of July 2, 1864, is intended to be used in opposition to the phrase, 'mineral lands' and to include all lands not mineral, and not iron, and not coal", and to the Master's conclusion to the same effect in the body of the report (p. 50). Said ruling is erroneous and the same is contrary to law for the reason that the proper meaning of the words "agricultural lands" in said section is the ordinary and accepted meaning of those words, that is, lands which are tillable or capable of cultivation.

Exception No. XI.

The plaintiff excepts to the conclusion of law ((b) of the Master on page 145) of his report that "The lands described in N. P. exhibits 144, 145 and 146 for which mineral base is assigned are of such

character as to be selectable as indemnity for mineral losses", and to the Master's conclusion to the same effect in the body of the report (pp. 58, 59, 97-101). Said conclusion is erroneous for the reason that the Master has found (a) p. 144) that all except 10,803.17 acres of the said land described in said Exhibits 144 and 146 "are not agricultural lands in the sense that they are tillable". No evidence was introduced to show that the patented lands in N. P. Exhibit 167 (mistakenly referred to as 145) on which mineral base was offered in substitution, were agricultural lands, and, as pointed out in Exception No. IX, there was no competent evidence tending to show their non-coal or non-iron character, either now, or at date of selection or patent. The Master was in error in construing the words "agricultural lands" as meaning "non-mineral lands".

Absaroka and Beartooth Forests

Exception No. XII.

The plaintiff excepts to the conclusion of law of the Master on [742] page 145 of his report that "Said lands are subject to the same rules as may apply to other withdrawn lands, within the principle of the Forest Reserve case", and his conclusion of law on page 64 of his report that these "lands became subject to selection when they ceased to be a part of the Crow Indian Reservation, and are as much within the rule of the Forest Reserve case as any other indemnity lands." Said conclusions are erroneous for the reason that:

(a) These lands were not comprehended in the grant but they were reserved lands at the time the Company definitely located its road through them and had been in that status for thirteen years.

(b) The Government had the right when it purchased them from the Indians to deal with them as any other public lands not covered by the grant, as conceded by the Master, page 62 of his report. His holding that a vested right arose in favor of the Company is unwarranted. After the lands were purchased from the Indians they did not occupy the same status as if they had never been reserved lands.

(c) No consideration moved from the Company to the Government in purchasing them.

Northern Cheyenne Indian Reservation

Exception No. XIII.

The plaintiff excepts to the Master's finding of fact ((b) on page 146) of his report that "The lands, when so reserved, were unoccupied and unappropriated public lands", for the reason there is no evidence to support this finding.

Exception No. XIV.

The plaintiff excepts to the Master's failure to find as requested in its request for finding of fact No. 33 as follows:

That there is no evidence from which the Master can find that these lands were unappropriated or unoccupied lands at the time the

reservation was created in 1900 or at any other time. [743]

Exception No. XV.

The plaintiff excepts to the Master's conclusion of law on page 146 of his report that "Northern Cheyenne Indian Reservation is a Government reservation within the meaning of Section 1 of the Act of June 25, 1929, and the lands therein are therefore governed by the same rules as may apply to lands within national forests and other Government reservations", for the said conclusion is erroneous for the following reasons:

(a) This reservation was not a Government reservation within the meaning of the Act of June 25, 1929, which means a reservation owned by the Government.

(b) As set forth in the Master's report, page 66, Congress by the Act of June 3, 1926, enacted that this Indian reservation "be and the same is hereby, declared to be the property of said Indians", and directed the allotment of the agricultural and grazing lands to the Indians. At that time there were approximately 1,408 Indians on the reservation which contained 489.500 acres (Senate Report No. 638, dated April 19, 1926, 69th Congress, 1st Session). Pursuant to said Act 1,547 allotments aggregating 233,120 acres were made in severalty to said Indians (Annual Report of Commissioner of Indian Affairs for 1932, p. 28).

(c) At the date of the passage of the Act of 1929 these lands did not belong to the United States, but they were the property of the Northern Cheyenne Indians numbering about 1,500 who were living on these lands. [744]

Substitution of Base

Exception No. XVI.

The plaintiff excepts to the Master's finding, both in the formal finding ((b) p. 147), and in the body of the report (pp. 77-79) to the same effect, that "the error (in the printed statute) was discovered in 1904" and that "for something over forty years all concerned understood the published statute to be as enacted and enrolled". (The formal finding implies that the Company lacked knowledge of notice of the correct provisions of the statute referred to prior to 1904).

For grounds of such exception, plaintiff says:

(a) That said finding is not supported by any evidence or any fact before the Court.

(b) That said finding is contrary to the undisputed evidence and admitted fact that from very early days the Company had a correct copy of the statute in its possession (testimony of witness Schwarm, Tr. 632).

(c) That said finding is contrary to the admitted fact that the mortgages executed by the Company May 1, 1879 and September 1, 1879 (Exhibits G and H attached to the amended bill of complaint) recite the exact language of

the statute, including the words "and within fifty miles thereof."

(d) That said finding is contrary to the undisputed facts disclosed by the testimony of the witness Schwarm (Tr. 942 to 943a) that the patented lands in respect to which substitution of base is now being sought, were originally selected by the Company between 1883 and 1897, the bulk of them being selected in 1883, 1885 and 1887, when the circumstances and terms of the grant were presumably well known to and fresh in the minds of the Company's agents.

(e) That said finding is contrary to facts of which the Court may take judicial notice, including the facts that the statute was [745] enacted at the solicitation of the incorporators of the Company, and that the Congressional proceedings (Congressional Globe, July 1, 1864, 38th Cong., 1st Sess., p. 3459, p. 3479; Cong. Globe, April 20, 1870, 41st Cong., 2d Sess., p. 2842) disclosed its true language.

(f) That said finding is contrary to the rule that the Company was, as a matter of law, chargeable with knowledge and notice of the terms of the statute.

(g) That said finding is contrary to the other findings of the Master:

1. That "in the very early days the company had a correct copy of the statute" (p. 78); and

2. That there is no evidence of what knowledge or lack of knowledge the Company

had, as disclosed by the Master's recital that "as the years went by, those having to do with the grant left the employ of the Company, and are all now dead", (p. 78), and "Of course, what form the copy Mr. Schwarm refers to was in, where it was kept, what, if any, use was made of it at the time, is not disclosed by the evidence and after all the years could not possibly be shown". (p. 79)

Exception No. XVII.

The plaintiff excepts to the Master's finding, both in the formal findings ((c) p. 147), and in the body of the report (pp. 77, 79 and 80) to the same effect, that "Both the company and the officials of the Department of the Interior assumed the printed statute to be correct and that therefore indemnity for mineral losses could be selected without limit of distance from the line of the road."

For grounds of such exception, plaintiff says:

(a) The finding that the Company assumed the printed statute to be correct implies that this assumption was based on lack of knowledge or notice and not upon inadvertence, and therefore said [746] finding is in error for all the reasons set out as grounds for exception to the finding of fact (b), p. 147, in the preceding numbered exception.

(b) The finding that the Company assumed that indemnity for mineral losses could be selected without limit of distance is not supported by any evidence or any fact before the Court.

(c) The finding that the Company assumed that indemnity for mineral losses could be selected without limit of distance is in disregard of the fact, which the Master should have found, that had the statute been enacted as printed, its language or a reasonable construction thereof, would not warrant any assumption that mineral losses could be selected without limit of distance, or within the second indemnity limits.

(d) The finding that the Company assumed that indemnity for mineral losses could be selected without limit of distance is contrary to the other findings of the Master in the body of the report to the effect that no evidence established that any such assumption was in fact made, as disclosed by the Master's recital (p. 79) that "In the nature of things, of course, no direct evidence can be had, as there is no person living who could know the fact".

Exception No. XVIII.

The plaintiff excepts to the Master's finding, both in the formal findings ((d) p. 147), and in the body of the report (pp. 79 and 80) to the same effect, that "acting upon that supposition the company used its general losses in first indemnity; whereas, but for the mistake, it would have used them in second indemnity, reserving mineral losses for first indemnity; and therefore by this mutual mistake the company was misled to its prejudice."

For grounds of such exception, plaintiff says:

(a) That the finding that the Company acted upon the supposition mentioned in using gen-

eral losses in first indemnity limits is not supported by any evidence or any fact before the Court. [747]

(b) That the finding that the Company so acted is contrary to and disproven by the undisputed facts that when such general losses were used by the Company, settlers were then locating upon first indemnity lands (statement of the Master, Tr. 935); and that mineral losses were small and thought to be small by the Company, which was then asserting its claims in the case of Barden v. Northern Pacific Railroad Company, 154 U. S. 288, and which facts disclose that there can be no reason for inferring that, but for any error in printing, or misapprehension in regard thereto, the Company would have acted otherwise than it did in making selections and assigning base, or would have been advantaged by so doing.

(c) That the finding that the Company so acted upon such supposition is contrary to the other findings of the Master in the body of the report which disclose that whether, at the time of such action, it would have been to the advantage of the Company to use subsequent losses in second indemnity limits, reserving mineral losses for first indemnity limits, or whether the Company would have considered such action advantageous at the time, is a matter purely of speculation, as disclosed by the Master's recitals that "The company may have thought

that its mineral losses would be so small that there would be enough land left in first indemnity to satisfy them when they were established" (p. 89), that it was prosecuting its contentions in the Barden case until 1894 (p. 90), that at the time in question "there were no ascertained mineral losses" (p. 78), and that "There is no evidence that the first indemnity limits were being settled up so fast that the company had to rush its subsequent losses in there to get ahead of settlers" (p. 90), (which implies that there is also no evidence that they were not being so settled up).

(d) That the finding that the Company was misled to its prejudice (and that it was in fact prejudiced by the manner in which its selections were made) is not supported by any evidence or any fact before the Court. [748]

(e) That the finding that the Company was misled to its prejudice, and was so prejudiced, is contrary to the evidence, which discloses that, because of the incoming settlers, and the other facts set out in paragraph (b) of this Exception, it was fully as advantageous for the Company to select indemnity lands as rapidly as possible using the losses then available, as to have withheld such losses for second indemnity lands.

(f) That the finding that the Company was misled to its prejudice, and was so prejudiced, is contrary to the specific findings in the body

of the Master's report which are stated and quoted above in ground numbered (c) for this exception, and which discloses that it is a matter purely of speculation whether the Company did in fact suffer any detriment.

Exception No. XIX.

The plaintiff excepts to the findings of the Master, both in the formal findings ((e) p. 147), and in the body of the report (p. 73) to the same effect, that "The Secretary of the Interior had permitted . . . substitution of base for reasons which appeared to him, in the exercise of his administrative discretion, to be sufficient", and for ground of such exception says that the facts before the Court show that the only instances where substitution of base was permitted were of the two classes mentioned by the Master (p. 71), namely, "where the selection list was still pending" or "where it (the Department of the Interior) had itself induced an error."

Exception No. XX.

The plaintiff excepts to the Master's conclusion ((a) p. 147), both as stated in the formal conclusions and in the body of the report (pp. 71 and 74) to the same effect, that "The Secretary of the Interior, in the exercise of administrative discretion, might properly permit or refuse substitution of base, as on occasion he did."

For grounds of such exception, plaintiff says.

[749]

(a) The findings of fact upon which said conclusion is based are erroneous and should not have been adopted as hereinbefore in these exceptions specified.

(b) The findings of fact as made do not support such conclusion as a matter of law.

(c) The said conclusion that the Secretary of the Interior might properly permit a substitution of base is erroneous and contrary to law in that:

1. The Secretary of the Interior was not and never has been vested with authority to permit substitution of base.

2. Permission to substitute base, as sought by the Company in this case and permitted by the report of the Master, is not authorized by the provisions of the grant, but is contrary thereto.

3. The regulation of the Department of the Interior requiring assignment of base in the selection of indemnity lands (4 L. D. 90, Circular of August 4, 1885) having the force and effect of law, operated to deny any right or authority for substitution or rearrangement of losses after selection and acquisition of indemnity lands by the Company.

Exception No. XXI.

The plaintiff excepts to the conclusion of the Master, both as stated in the formal conclusions ((a) p. 147), and in the body of the report (p. 74)

to the same effect, that "Likewise the court, in the exercise of judicial discretion, in the application of established principles of equity, may permit or refuse (substitution of base)."

For grounds of such exception, plaintiff says:

(a) The Court is not authorized by the Constitution or laws of the United States or otherwise to permit substitution of base [750] as allowed by the Master.

(b) The said conclusion is contrary to law.

(c) The findings of fact upon which said conclusion is based are erroneous and should not have been adopted as hereinbefore in these exceptions specified.

(d) The findings of fact as made do not support such conclusion as a matter of law.

(e) If the Secretary of the Interior ever had any power to grant or deny substitution of base, his participation in the making of any withdrawal that would be invalidated by the granting of substitution of base was, in itself, an exercise of such power in denial of substitution. The withdrawals referred to are listed on pages 103 to 105 of the Master's report.

(f) The Court is not charged with the duty of undertaking a rearrangement or substitution of base for the purpose of awarding the Company the maximum calculable percentage of the acreage originally within the place limits of the grant, nor is the same, or any part thereof, within the jurisdiction of this Court.

(g) The Court is not vested with any administrative or other power to adjust the grant in the sense in which that term is used by the Master in that part of his report where he recites (p. 74); "I am now of the opinion, therefore, that such adjustment of the grant is committed to this court, with the same power and authority possessed by the Secretary under the previous statute directing him to adjust," as is more particularly specified in Exception No. XXXIX.

(h) There are no allegations in the pleadings warranting or justifying the relief described in this conclusion. [751]

Exception No. XXII.

The plaintiff excepts to the conclusion of the Master, both as stated in the formal conclusions ((b) p. 147), and in the body of the report (p. 76) to the same effect, that "The maxim that 'He who seeks equity must do equity' requires that the substitution proposed by N. P. exhibit 145 be allowed".

For grounds of such exception, plaintiff says:

(a) Said conclusion is erroneous and contrary to law.

(b) The allowance of such substitution of base is not within the powers of this Court nor authorized by law.

(c) It is the Company which seeks affirmative equitable relief by way of substitution of losses, and the maxim has no application to support such relief.

(d) The findings of fact upon which said conclusion is based are erroneous and should not have been adopted as in these exceptions specified.

(e) The findings of fact as made do not support such conclusion as a matter of law.

(f) No allegations of the pleadings warrant the award or allowance of substitution of base.

(g) The Master erroneously admitted in evidence, over the objection of the plaintiff that the same was irrelevant and inadmissible by reason of there being no issue with respect thereto raised by the pleadings and no allegations in the pleadings in support thereof, the N. P. Exhibit 138 and other evidence and testimony offered by the Company in support of its request for substitution of base (Tr. 615 and 616).

(h) The Master erroneously attempts to apply the maxim without giving consideration to the issues of fraud, forfeiture or breach of contract on the part of the Company, or any other equity militating against the Company.

(i) Said conclusion is erroneous for all the reasons set forth as grounds of Exception No. XXI. [752]

Exception No. XXIII.

The plaintiff excepts to the conclusion of the Master, both as stated in the formal conclusions ((c) p. 148), and in the body of the report

(pp. 80-82) to the same effect, that "The Mutual mistake as to the terms of the mineral indemnity proviso was not a mistake of law, but of fact, and is therefore correctible."

For grounds of such exception, plaintiff says:

(a) Said conclusion is erroneous and contrary to law.

(b) The allowance of substitution of base, under the guise of correction of a mistake or otherwise, is not within the powers of this Court nor authorized by law.

(c) The findings of fact upon which said conclusion is based are erroneous and should not have been adopted as in these exceptions specified.

(d) The findings of fact as made do not support such conclusion as a matter of law.

(e) The Company has pleaded no matters of facts to Warrant such conclusion, nor has it prayed for such relief.

(f) Said conclusion is erroneous for all the reasons set forth as ground of Exception No. XXI.

Exception No. XXIV.

Plaintiff excepts to the conclusion of the Master, both as stated in the formal conclusions ((d) p. 148), and in the body of the report (p. 93) to the same effect, that "The mistake should be corrected by permitting the company to withdraw its assigned

general losses and substitute therefor mineral losses as proposed by said exhibit."

For grounds of such exception, plaintiff says:

(a) Said conclusion is erroneous and contrary to law.

(b) The allowance of such substitution is not within the powers of this Court nor authorized by law. [753]

(c) The findings of fact upon which said conclusion is based are erroneous and should not have been adopted as in these exceptions specified.

(d) The findings of fact as made do not support such conclusion as a matter of law.

(e) The Company has pleaded no matters or facts to warrant such conclusion, nor has it prayed for such relief.

(f) Such conclusion is erroneous for all the reasons set forth as grounds of Exception No. XXI.

Exception No. XXV.

The plaintiff excepts to the conclusions of the Master in relation to substitution of losses, to the effect that "the Court may permit or refuse (substitution of base)" ((a) p. 147), that the equitable maxim quoted "requires that the substitution proposed by N. P. Exhibit 145 be allowed" ((b) p. 147), that the mistake as to the terms of the mineral indemnity is correctible ((c) p. 148), and should be corrected by permitting the Company to withdraw its assigned general losses and substitute therefor

mineral losses as proposed by said exhibit ((d) p. 148).

As further grounds for such exception to each and every part of said conclusions, and to all thereof, and by way of further exception to said report and the findings and conclusions thereof relating to substitution of losses, plaintiff says:

(a) Said conclusions and each and all thereof, are erroneous for the reason that the evidence disclosed and required a finding which the Master should have made, that the selections of the greater portion of the lands previously patented and in respect to which mineral losses are sought to be substituted as base were made prior to 1888 (Testimony of the witness Schwarm, Tr. 942 to 943 a), and so close in point of time to the grant as to require an inference of knowledge of the language of the act, and that the facts referred to in Subdivisions (b) and (c) of Exception No. XVI conclusively show such knowledge. [754]

(b) Said conclusions, and each and all thereof, are erroneous for the reason that the evidence disclosed and required a finding which the Master should have made that the Company, by acquiescing in the refusal of the Department of the Interior to permit substitution of base, by taking no appeal from the decision of the Commissioner, while writing the letter of Britton & Gray (Government Exhibit 297), United with the officers of the United States in

putting a practical construction upon the provisions of the grant by the conduct of both parties thereto.

(c) Said conclusions, and each and all thereof, are erroneous for the reason that the evidence disclosed and required a finding or conclusion which the Master should have made, that the issuance of patents upon the lands in respect to which the Company now requests that unused base be substituted, and pursuant to selections of the Company assigning base, constituted a completed transaction and an adjudication by the Interior Department as to the Company's right to the land selected upon the basis of the losses assigned, which this Court will not modify, change, or disturb.

(d) Said conclusions, and each and all of them, are erroneous for the reason that the evidence disclosed and required a finding or conclusion, which the Master should have made, that by participating in the making of any withdrawal that would be invalidated by the granting of substitution of base, the Secretary of the Interior exercised all powers vested in him in denial of substitution of base.

(e) Said conclusions, and each and all of them, are erroneous for the reason that the evidence disclosed and required a finding or conclusion, which the Master should have made, that the Company in selecting indemnity lands, assigning base therefor, submitting the same to

the Department of the Interior for action and securing patents for the lands so selected, elected to exercise its rights [755] of selection as it did, and that the resultant acquisition of such lands was in each case a completed transaction which neither the Company nor the Court may now modify.

(f) Said conclusions, and each and all of them are erroneous for the reason that the evidence disclosed and required a finding or conclusion, which the Master should have made, that the Company is barred by its own delay and laches from substituting base or losses, and from procuring such substitution from this Court.

Exception No. XXVI.

The plaintiff excepts to the conclusions of the Master, both as stated in the formal conclusions ((e) p. 148), and in the body of the report (pp. 88-93) to the same effect, that "The action of the Company in making its several assignments of general losses was not an election, first, because the common law doctrine of election is not applicable to these selections, and second, because, if it were, the election was made under a mistake of fact and is not binding."

For grounds of such exception, plaintiff says:

(a) Said conclusion is erroneous and contrary to law.

(b) The evidence before the Master (N. P. Exhibit 167) discloses that the selection of

lands acquired by the Company was done and performed by the Company itself, which presented the losses upon which the several selections were based and acquired title to the lands so selected by its own voluntary action and choice of base, and that thereby the Company elected to make selections and utilize base in the accomplishment of completed transactions.

(c) The evidence and other findings of the Master referred to and specified in the grounds of Exceptions Nos. XVI, XVII and XVIII discloses that no mistake of fact occurred.

(d) The findings of fact upon which said conclusion is based are erroneous and should not have been adopted as in these exceptions specified.

(e) The findings of fact do not support such conclusion as a matter of law. [756]

Exception No. XXVII.

The plaintiff excepts to the conclusion of the Master, as stated in the formal conclusions ((f) p. 148) to the effect that "After denial by the Department of its requests for substitution, the company had no remedy, and did not acquiesce in the rejection of its requests."

For grounds of such exception, plaintiff says:

(a) The conclusion that the Company did not acquiesce in such rejection is erroneous and contrary to law.

(b) The failure to take an appeal from the decision of the Commissioner of the General

Land Office (Government Exhibit 295) and the writing of the letter by Britton & Gray (Government Exhibit 297) did, as a matter of law, amount to an acquiescence in the rejection of the request for substitution.

Exception No. XXVIII.

The plaintiff excepts to the conclusion of the Master, as stated in the formal conclusions ((g) p. 148), that "the letter from Messrs. Britton & Gray did not amount to nor evidence any acquiescence by the Company in the general principle of the right of substitution, nor amount to more than a statement by counsel to the Secretary that they would pursue the matter no further before him. It could not have been said that after that letter was written the Company could make of him no further requests for substitution, and it most certainly does not affect the Company's right under the principle that the plaintiff must do equity".

For grounds of such exception, plaintiff says:

(a) Said conclusion is erroneous and contrary to law.

(b) The letter referred to in fact discloses an acquiescence by the Company in the ruling of the [757] Commissioner of the General Land Office, particularly in view of the failure to take an appeal as provided by law.

(c) The equitable principle referred to does not aid the Company in seeking affirmative equitable relief by way of substitution of losses and therefore does not apply.

(d) The conclusion is contrary to findings of fact (f) and (g) made by the Master on page 147 of the report.

Exception No. XXIX.

The plaintiff excepts to the failure of the Master to find as requested by plaintiff (plaintiff's request for finding of fact No. 35) "That the claims of the defendants to the patented lands on which defendants now request that unused base be substituted have been adjudicated by the Interior Department which adjudications have resulted in the issuance of patents to the Railroad Company or Railway Company and these proceedings have been acquiesced in by defendants for twenty to fifty years." The reason for this exception is that the testimony of the witness Schwarm (Tr. 942, 943 and 943a) shows that the lands on which substitution of base is now being asked were originally selected by the Company between 1883 and 1897, the bulk of them being selected in 1883, 1885 and 1887 and that the lands so selected were patented to the Company from 1893 or 1894 up to 1924. N. P. Exhibit 167 shows that the patented lands in the grant of 1864 on which the Company is now asking substitution of base were patented to the Company as indemnity lands from twenty to forty years ago. There is no evidence that the Company has sought to disturb these adjudications prior to the trial of this case, except as to approximately fifteen thousand acres of patented lands involved in Bismarck Lists 54 and 56.

Exception No. XXX.

The plaintiff excepts to the failure of the Master to find as requested by plaintiff (plaintiff's request for findings of fact No. 36) "That no contention is made in this case that the proceedings in the Interior Department, by which conveyances of the patented lands on which defendants now ask that base be substituted were obtained, are for [758] any reason erroneous or invalid." The reason for this exception is that there is no evidence, nor any statement of counsel appearing in the record or in the briefs on file before the Master, charging that the proceedings in the Interior Department, which resulted in the issuance of patents to lands on which defendants now ask substitution of base are for any reason erroneous or invalid.

Exception No. XXXI.

Plaintiff excepts to the failure of the Master to find as requested by plaintiff (plaintiff's request for findings of fact No. 37) "That defendants have had most of the substitute losses which they now offer in substitution for original losses for upwards of thirty years and some of them for upwards of fifty years and that they have not, prior to the trial of this case, offered them in substitution except as to approximately fifteen thousand acres of losses involved in Bismarck Lists numbered 54 and 56", and to the Master's conclusion (p. 94) to the effect that the doctrine of laches has no application to prevent substitution of base. The reason for this excep-

tion is that N. P. Exhibit 167 shows that some of the losses now offered in substitution are prior losses established by the definite location of the road and many of the losses resulted from mineral classification approved in the years 1897 to 1903 inclusive. There is no evidence that these losses were offered in substitution prior to the trial of this case, except as to losses involved in Bismarck Lists 54 and 56. The conclusion that laches is not applicable is contrary to law.

Exception No. XXXII.

The plaintiff excepts to the failure of the Master to find that the Company has, since January 9, 1915, when the Company's request for substitution of base for indemnity originally offered in Bismarck Lists 54 and 56 was denied, acquiesced in the denial of such request for substitution of base, which finding the plaintiff requested the Special Master to make in its request No. 38. The reason for this exception is that Government Exhibit 297 shows that the Company acquiesced in the denial of its request for the substitution of base involved in Bismarck Lists 54 and 56 and there is no evidence to the contrary.

[759]

Exception No. XXXIII.

The plaintiff excepts to the failure of the Master to find, as requested by plaintiff in its requested finding of fact No. 39, "That ever since the withdrawal of the second indemnity lands in Montana and Idaho to which defendants in their Exhibit 145

have assigned original losses which they propose shall be released by substitution, the plaintiff has had said lands under administration and has expended large sums of money thereon for preservation, development and protection of said lands." The reason for this exception is that in Subdivisions XXI and XXXVII of plaintiff's amended bill of complaint these facts are alleged and they are, in substance, admitted in Subdivisions XXI and XXXVII of the Company's amended answer.

Exception No. XXXIV.

The plaintiff excepts to the failure of the Master to find, as requested in plaintiff's requested finding of fact No. 40, "That there is no proof in this case showing that the patented lands which have heretofore been obtained by defendants by use of Montana or Idaho subsequent base and on which defendants now request that they be permitted to substitute mineral base, as shown by defendants' Exhibit 145, are now or were, at the time said lands were patented, agricultural lands." The reason for this exception is that the record does not contain any proof justifying a finding that the patented lands on which defendants' request that the Court allow substitution of mineral base are now, or were at the time they were patented, agricultural lands.

Exception No. XXXV.

The plaintiff excepts to the failure of the Master to find, as requested by plaintiff in its requested finding of fact No. 41, "That the proof in this case

is wholly inadequate to show that the patented lands which were obtained by defendants by use of Montana or Idaho subsequent base and on which defendants now request that they be per- [760] mitted to substitute mineral base are now, or were, at the dates said lands were selected or patented, non-coal and non-iron lands." The reasons for this exception are:

(a) That there is no competent proof justifying a finding that such patented lands are now, or were, at the times they were selected or patented, non-coal lands; and

(b) There is no proof in the record that such lands are now, or were, at the times they were selected or patented, non-iron lands, all as pointed out in Exception No. IX.

Exception No. XXXVI.

The plaintiff excepts to the rulings of the Master admitting in evidence defendants' testimony and exhibits in support of their request for substitution of base over the objection of the plaintiff that defendants did not allege facts entitling them to substitution of base, or pray for relief of that kind, and, further, that they have no right as a matter of law to substitution of base. The ruling upon the admission of defendants' Exhibit 138, being their first substitution exhibit, appearing at pages 615 and 616 of the transcript of evidence. The objection was further urged as to all the proof offered by defendants in support of their request for substitution, as

shown at pages 629, 630, 657, 715, 717, 729 and 802 of the transcript of evidence.

The admission of the evidence was erroneous for the following reasons:

(a) Defendants did not plead any facts entitling them to substitution of base nor did they make any request in their pleadings that they be allowed to substitute base.

(b) Defendants have no right in law or equity to substitution of base.

Exception No. XXXVII.

The plaintiff excepts to the Master's findings and conclusions with respect to substitution of losses, and particularly to the con- [761] clusion that the Company should be permitted to substitute losses as proposed in N. P. Exhibit 145, for the reason that the Master's report and conclusions that such substitution of losses should be permitted amounts to the awarding to the Company of affirmative equitable relief, and plaintiff says that upon the hearing heretofore had before the Master resulting in a report and findings upon other issues previously submitted to the Master by the Court and which report was confirmed by the Court by an order or decree dated October 3, 1935, as amended January 29, 1936, the Company disclaimed any demand or request for affirmative or equitable relief. The former report of the Master referred to, as respects the plaintiff's then contention with respect to the issues of fraud, forfeiture, breach of contract on the part of the Company, and other issues raised by the or-

iginal bill of complaint, and to the effect that such issues should be heard and determined by the Court by reason of the equitable maxim that "he who comes into equity, must come with clean hands", was based and founded upon such disclaimer by the Company, and plaintiff says that by reason thereof the Company cannot now claim nor the Master award such affirmative equitable relief nor permit or allow substitution of losses as is done in such report.

Exception No. XXXVIII.

The plaintiff excepts to the Master's findings and conclusions with respect to substitution of losses, and particularly to the conclusion that the Company should be permitted to substitute losses as proposed in N. P. Exhibit 145, and as ground of this exception says:

By order or decree dated October 3, 1935, as amended January 29, 1936, the Court confirmed a former report of the Master dated May 31, 1933, relating to certain of the issues in this suit. Reference to such report and decree will disclose that certain matters set out in the original bill of complaint, tendered issues for [762] the purpose of depriving the Company of relief herein under the maxim that "he who comes into equity must come with clean hands." Such report discloses that among the issues so tendered were the following:

(a) That the mineral losses now sought to be utilized as a basis for the request of substi-

tution came into existence through the fraud and misconduct of the Company.

(b) That the Company was in default in the performance of the terms of the grant in the particulars set forth in the bill, and was therefore barred from relief in this suit.

By such report and decree such issues were eliminated from the suit upon the ground that no affirmative relief was sought by the Company and that it was therefore not an actor in the suit, and hence the maxim quoted did not apply. (See former report pp. 30, 31).

By purporting to grant the Company substitution of losses upon the theory that the same is proper affirmative equitable relief, the Master now discloses a situation in which the Company is an actor, seeking affirmative relief, and subject to the application of the "clean hands" rule.

The Court ought not to sustain the findings and conclusions awarding the Company such relief, after having foreclosed plaintiff from proving equities which would operate to deny such relief under the maxim quoted.

Exception No. XXXIX.

The plaintiff excepts to the conclusion of law of the Master contained in the body of the report and stated in the language beginning with the third sentence on page 74, and concluding with the second sentence on page 75, and summarized in the words (p. 74); "I am now of the opinion, therefore, that

such adjustment of the grant is committed to this court, with the same power and authority possessed by the Secretary under the previous statute directing him to adjust," and to the Master's determination pursuant thereto that [763] the grant should be adjusted by the process of permitting substitution of losses.

Plaintiff says that said conclusion and determination are erroneous for that:

(a) It is an erroneous construction of the Act of June 25, 1929, which confers no such power on this Court.

(b) It assumes a power in this Court which would be administrative or legislative in character and not within the judicial power conferred upon this Court by section 1 of Article III of the Constitution of the United States and defined in section 2 of said Article. Said Act of June 25, 1929 could not under the limitations of said section 2 confer upon this Court power to revise, review, or otherwise deal with administrative decisions, or to exercise administrative or legislative powers, and should not be construed to attempt to do so. [764]

AVAILABILITY OF WITHDRAWN LANDS FOR INDEMNITY SELECTIONS

Exception No. XL.

The plaintiff excepts to the Master's finding (c), page 149 of the report, that "On December 31, 1935, counting withdrawn lands, whether surveyed or un-

surveyed, but excluding mineral, there was an excess of approximately 24,000 acres'' and to his statements to the same effect in the body of his report (pp. 106, 116 and 118), for the following reasons:

(a) The finding is erroneous in that it combines all losses, whether prior, subsequent or mineral losses, for comparison with withdrawn lands without regard to whether said lands are within the first indemnity limits, second indemnity limits or mineral indemnity limits, and does not make any differentiation between the character of the losses or the location of the lands.

(b) If the theory on which the finding is made were correct, the finding itself is erroneous in that it is not supported by the evidence in the following particulars:

1. The excess of approximately 24,000 acres is arrived at by assuming the total area withdrawn in the indemnity limits of the grant of 1864, as shown by plaintiff's Exhibits 110 to 188 inclusive and 152A, 161A, 184A, 184AA, 184B, 110A, 111A, 111B, 188A, 188B and 188C to be 2,369,027.95 acres, and by deducting therefrom 30,000 acres of non-mineral lands in the second indemnity belts in Idaho, 3,300.82 acres of Fort Ellis lands in Montana, and 92,276.70 acres of withdrawn lands conceded to be mineral, whereas the lands in the item of 3,300.82 acres and the

lands in the item of 92,276.70 acres are not included in the area shown on said exhibits, but have al- [765] ready been eliminated therefrom and the correct area of the withdrawn lands as shown by the said exhibits is 2,363,901.34 acres which exceeds the area of the deficiency in the grant of 1864, as found by the Master (2,220,224.17 acres) by 143,677.17 acres. If the item of approximately 30,000 acres in the second indemnity limits in Idaho is deducted, the excess of all withdrawn lands over all losses would still be 113,677.17 acres instead of approximately 24,000 acres as found by the Master.

2. The tabulations appearing on pages 103 to 105 of the Master's report are erroneous in these respects:

(a) The area of 4,046.05 acres shown as being in Government Exhibit 126 is included in the area of 42,252.01 acres shown in Government Exhibit 123.

(b) The area of 1,825.56 acres shown as being in Government Exhibit 129 should be 2,225.56 acres.

(c) The item of 37,512.90 acres shown as being in Government Exhibit 147 should be 37,511.80 acres.

(d) The item of 4,682.17 acres shown as being in Government Exhibit 161A should be 4,682.71 acres.

(e) The item of 120 acres shown as being in Government Exhibit 177 should be omitted.

(f) The item of 1,360 acres shown as being in Government Exhibit 180 should be omitted because it is also included in the item of 5,909.68 acres shown in Government Exhibit 182.

(g) All footings should be corrected to reflect these changes. **[766]**

Exception No. XLI.

The plaintiff excepts to that part of the Master's conclusion (a), page 149 of his report, wherein he states that "In determining, therefore, whether the lands in indemnity limits were sufficient to supply the losses, neither mineral nor unsurveyed lands should be counted" and also the Master's conclusion to the same effect on page 112 of the body of his report, for the following reasons:

(a) The Master's conclusion is contrary to law.

(b) The Master's conclusion is erroneous in that he should have concluded that lands in the indemnity limits, which were unsurveyed at the time of any given withdrawal, should be counted in determining the validity of such withdrawal.

(c) The conclusion is erroneous in that the Master should have concluded that lands, which,

subsequent to the date of any given withdrawal, were found to be mineral in character, should have been counted in determining the validity of such withdrawal.

Exception No. XLII.

The plaintiff excepts to the Master's conclusion (b), page 149 of the report, wherein he says "All the withdrawals listed in Govt. Exhibits 110, 111, 113 to 188, both inclusive, 152A, 161A, 184A, 184AA, 184B, 110A, 111B, 188A, 188B and 188C were invalid and ineffective as against the indemnity selection rights of the defendants, except as to 3,300.82 acres of abandoned Fort Ellis lands" and to the Master's conclusion to the same effect in the body of his report (p. 117). (The plaintiff does not except to the conclusions of the Master as to the item of 3,300.82 acres of abandoned Fort Ellis reservation lands). The reasons for this exception are as follows:

(a) The Master's conclusion is contrary to law.

(b) The Master's conclusion is found on erroneous findings of fact as pointed out in these exceptions. [767]

(c) In making his computation of the area of public lands remaining in the indemnity belts, after the respective withdrawals were made, for the purpose of determining the validity of such withdrawals, the Master erroneously failed to include unsurveyed lands in the indemnity limits of the grant.

(d) In computing the area of vacant public lands remaining in the indemnity limits after the respective withdrawals under consideration were made, for the purpose of determining the validity of such withdrawals, the Master erroneously failed to include lands classified as mineral subsequent to the date of such withdrawals.

(e) In any event the conclusion is erroneous for the reasons stated in Exception No. XLVIII.

Exception No. XLIII.

The plaintiff excepts to the Master's conclusion (c), page 150 of his report, that the "Northern Pacific Railway Company may designate and have compensation under the act of July 25, 1929, for all such withdrawn lands, with the exception just noted, to the extent of the deficiency as found, save that in second indemnity limits in Idaho it may not select, including valid selections heretofore made in said limits, more than the quantity of its subsequent losses in Idaho, and save that it may not select lands conceded to be mineral", and to the Master's conclusion to the same effect in the body of his report (pp. 116 and 117), for the following reasons:

(a) The conclusion is contrary to law.

(b) The conclusion is based on erroneous findings of fact and conclusions of law, more particularly set forth and excepted to in these exceptions.

(c) There is no evidence that the lands described in defendants' Exhibits 144 and 146 to which mineral base is assigned are "unoccupied and unappropriated agricultural lands", whereas, [768] the undisputed evidence (Tr. 1106 to 1379) shows that such lands are not agricultural lands, except as to 10,803.17 acres thereof, as is more particularly set forth in plaintiff's Exceptions numbered VIII, X and XI hereof which are adopted and made a part of this exception, and as is further shown by the Master's finding (a) on page 144. Therefore, the Company is not entitled to compensation for such lands.

(d) There is no evidence that the Railway Company has unused losses of the character assignable to all the lands in the second indemnity limits of the States of Montana or Idaho, but on the contrary the evidence shows that the Railway Company does not have in excess of 112,676.52 acres of unused losses satisfiable in the second indemnity limits of Montana (See Govt. Exhibit 91) and does not have in excess of 21,867.58 acres of unused losses satisfiable in the second indemnity limits of Idaho (See Government Exhibit 96), whereas the withdrawn lands, above referred to, in the second indemnity limits of those States, respectively, very greatly exceed such unused losses (p. 103). The unused losses here mentioned are the only losses available upon which the Company may

base a claim for such withdrawn lands, for the reason that substitution of losses is not permissible, and this for all of the reasons set forth in Exceptions Nos. XVI to XXXIX inclusive, all of which are hereby made additional grounds for this exception.

(e) The conclusion is erroneous for that the Northern Pacific Railway Company may not have compensation for withdrawn lands in the Absaroka and Beartooth National Forests for the reasons more particularly stated in plaintiff's Exception No. XII which exception is, by reference, made a part of this exception.

(f) The conclusion is erroneous for that the Northern Pacific Railway Company may not have compensation for withdrawn lands in the Northern Cheyenne Indian Reservation for the reasons more par- [769] ticularly stated in plaintiff's Exceptions numbered XIII and XV.

(g) The conclusion is erroneous for that the Company may not have compensation for 3,710.31 acres of lands in the indemnity limits (described in Government Exhibit 288), which were entered by settlers prior to June 5, 1924 and subsequently patented to them, for the reasons more particularly set out in Exception numbered LIV which is adopted and made a part of this exception.

(h) The conclusion is erroneous for the following reasons: It appears from Government Exhibits 298, 299 and 300 that 47,686.41 acres

of the land which the Master found are mineral are in the Absaroka and Beartooth Forests in the place limits of the grant of 1864. It also appears from Government Exhibit 298 that 43,-869.41 acres of these lands were used by the Company as subsequent losses to obtain lands in the second indemnity belt in Montana. An examination of Government Exhibits 299 and 300 and N. P. Exhibit 145 and the report of the Master (p. 101) will disclose that he held that 1,600 acres of these 47,686.41 acres could be released and used as subsequent losses to obtain land in the second indemnity belt in Montana. Likewise the Master rules that the balance of 2,217 acres of these lands could be assigned as unused base to obtain lands in the second indemnity belt in Montana. To such rulings of the Master the plaintiff excepts for the reason that such lands being mineral loss may not constitute base for second indemnity.

(i) This conclusion is based upon all other conclusions relating to the deficiency at the dates of the several withdrawals, the quantity of lands in the several indemnity limits, the character of losses available for use, and the availability of indemnity land for selection. A rejection of any of such conclusions will require a different conclusion than the one here excepted to, and for that reason, plaintiff says that all grounds herein specified for exception to such other conclusions, are reasons why this conclusion is erroneous. [770]

Exception No. XLIV.

The plaintiff excepts to the Master's conclusion (d) (p. 150), that "In designating land for which it claims compensation, the railway need not specify a particular loss in place for each indemnity tract for which compensation is claimed", and to the conclusion to the same effect in the body of the Master's report (pp. 117 and 119). This conclusion is erroneous for the following reasons:

(a) It disregards the provisions of the Act of July 2, 1864 and the Joint Resolution of May 31, 1870 relative to the selection of indemnity lands and disregards the different kinds of losses and the different indemnity limits to which they may be assigned.

(b) It is contrary to law.

Exception No. XLV.

The plaintiff excepts to the Master's failure to find, as requested by plaintiff in its request for finding of fact No. 10, that "All withdrawals by the plaintiff of public lands in the second indemnity belts in Montana made prior to December 31, 1903 were made at times when there remained in said belts more vacant public land than was required to satisfy the unused subsequent losses existing at the respective dates of such withdrawals", for the following reasons.

(a) Plaintiff's Exhibit No. 91 shows that all withdrawals in the second indemnity belts in Montana, made prior to December 31, 1903,

were made at times when there remained in said belts more vacant public land than was required to satisfy the unused losses satisfiable in said belts and this fact is also shown by the uncontradicted testimony of the witness Barber (Tr. 550 to 553).

(b) There is no evidence to the contrary.

Exception No. XLVI.

The plaintiff excepts to the failure of the Master to find, as requested by plaintiff (No. 12), that "All withdrawals by the plaintiff of public lands in the second indemnity belts in Idaho, made [771] prior to December 31, 1905, were made at times when there remained in said belts more vacant public lands than were required to satisfy the unused subsequent losses existing at the respective dates of such withdrawals", for the following reasons:

(a) Plaintiff's Exhibit 96 shows that at the times of all the respective withdrawals made prior to December 31, 1905 the vacant public lands in the second indemnity belts in Idaho exceeded the unused losses satisfiable in said indemnity belts. This is also shown by the witness Barber (Tr. 169 and 170).

(b) There is no evidence to the contrary.

Exception No. XLVII.

The plaintiff excepts to the failure of the Master to find, as requested by plaintiff (No. 13), that "After the withdrawal on March 1, 1898 of 163,280 acres in the second indemnity belt in Idaho, as

shown by Government Exhibit No. 96, there remained 270,583.37 acres of vacant public land in said belt of which 25,500.72 acres were surveyed, and that the unused subsequent losses satisfiable in said belt at the time of said withdrawal aggregated 30,879.76 acres''. The reasons for this exception are as follows:

(a) Plaintiff's exhibit 96 shows that after the withdrawals on March 1, 1898 of 163,280.00 acres in the second indemnity belts in Idaho there remained 270,583.37 acres of vacant public land in said belts and that the unused losses at the end of the year were 30,879.76 acres and at the end of the previous year 58,180.65 acres, and plaintiff's Exhibit 95 shows that of the 270,583.37 acres of vacant land in said belts at the end of the year 25,500.72 acres were surveyed.

(b) The proof referred to in (a) of this exception is not disputed and there is no evidence to the contrary.

(c) Even if the Master should have been of the opinion that unsurveyed vacant public lands in said indemnity belts on the date [772] of such withdrawal should not be counted in computing the amount remaining for the satisfaction of losses satisfiable in said belts, he should have found that said withdrawals of March 1, 1898 were valid except as to 5,379.04 acres, the difference between 30,879.76 acres and 25,-500.72 acres.

Exception No. XLVIII.

The plaintiff excepts to the failure of the Master to find, as requested by plaintiff (No. 14), that "On March 21, 1905 the Government withdrew for forest purposes 108,683.73 acres of land in the second indemnity limits in Idaho as shown in Government Exhibit 96: that after such withdrawal was made there remained in the second indemnity limits in Idaho 46,560.67 acres of vacant public lands of which 44,073.15 acres were surveyed as shown by Government Exhibit 95; that the unused subsequent losses in Idaho at the time said withdrawal was made were 29,576.25 acres as shown on Government Exhibit No. 96; that after said withdrawal was made the remaining vacant surveyed public lands in the second indemnity belt in Idaho exceeded the unused subsequent losses by 14,496.90 acres." The reasons for this exception are as follows:

(a) Even if the Master were correct in holding that unsurveyed lands and lands subsequent classified as mineral should not be included in computing the area of vacant public lands within the indemnity limits on the date of said withdrawal of March 21, 1905, for the purpose of determining the validity of said withdrawal, he should have found the above facts which are shown by plaintiff's Exhibits 95 and 96.

(b) There is no evidence to the contrary.

(Such finding would require a holding that the withdrawal mentioned was valid. The Master has

erroneously avoided this necessary hold- [773] ing by allowing substitution of base, and apparently relating it back prior to this withdrawal to invalidate a withdrawal that was otherwise valid).

Exception No. XLIX.

The plaintiff excepts to the conclusion of the Master (p. 110 in the body of his report) that the satisfaction of losses "is as though all losses were equally flexible, and might be satisfied indiscriminately" and that the several sorts of losses are, in practical effect, interchangeable (p. 117) for the reason that such conclusion is contrary to law.

Exception No. L.

The plaintiff excepts to the conclusion of the Master, (p. 116) in the body of his report, to the effect that the Company's selection rights were, in substance, taken by eminent domain by means of the Act of June 25, 1929. The reasons for this exception are:

(a) The conclusion is contrary to law.

(b) The conclusion is not supported by any proof but is contrary to the facts.

Exception No. LI.

The plaintiff excepts to the conclusion of the Master (p. 118) that "The excess at present is so small—about 24,000 acres out of 2,244,000—as to bring the case almost within the rule of the Land Office and the courts, that no selection is necessary

when all the lands are required to satisfy the deficiency. All are appropriated". The reasons for this exception are:

(a) The conclusion is contrary to the facts as more specifically pointed out in No. XL of these exceptions.

(b) The conclusion is contrary to law. [774]

Exception No. LII.

The plaintiff excepts to the Master's conclusion of law on page 10 of the body of his report to the effect:

"The language of the resolution authorizing second indemnity limits uses the term 'subsequent to the passage of the act' only as a measure of the quantity of losses that may be satisfied in second indemnity, not as a definition of the character of those losses. So long as the selections made in second indemnity do not exceed the subsequent losses, both prior and subsequent losses may be satisfied in second indemnity."

For reasons of such exception the plaintiff says:

(a) That such conclusion is contrary to the terms of the grant of July 2, 1864, and of the Resolution of May 31, 1870.

(b) That such conclusion is contrary to the holding of the Land Department that only subsequent losses can be indemnified in second

indemnity limits, as pointed out by the Master in the body of his report at page 10.

Exception No. LIII.

The plaintiff excepts to the Master's conclusion on page 105 in so far as he holds that the amount of second indemnity lands in withdrawals in Idaho which are beyond reach is "about 30,000 acres", in that the amount so beyond reach greatly exceeds 30,000 acres, for the reason that valid withdrawals in Idaho to which attention has been called in Exceptions XLIII, XLVI, XLVII and XLVIII, greatly augment the quantity of lands in Idaho for which no compensation is payable.

Lands Patented to Homesteaders After Withdrawal.

Exception No. LIV.

The plaintiff excepts to the Master's conclusion of law, page 150 of his report, as to 3,710.31 acres entered under the general homestead laws or by other filings prior to the Act of June 5, 1924 that "Since the withdrawals were invalid, the company should have compensation as though the lands remained in their withdrawn status and had not been [775] patented." This conclusion is erroneous for the reason that as the entries were made prior to June 5, 1924, followed by patents issued to the applicants, the title of the applicants related back to the dates of entry and these lands were not a part of the withdrawals on June 5, 1924 and there-

fore no compensation therefor, under the terms of the Act of June 25, 1929, can be awarded to the Company.

1,641.27 Acres in Former Fort Ellis Military Reservation.

Exception No. LV.

The plaintiff excepts to the failure of the Master to find as a fact as requested by the United States in its 45th request for findings of fact "That 1.641.27 acres in former Fort Ellis Military reservation and referred to on Northern Pacific Exhibit 138 Revised was a mineral loss." The evidence of the Company's witness Schwarm (Tr. 637-638) and N. P. Exhibit 138 Revised show that this land was in the military reservation created November 25, 1873 when the railroad was located opposite this land. In July 1895 the land was classified as mineral by Bozeman Board of Mineral Commissioners, approved by the Secretary of the Interior January 14, 1896, and the Company thereafter used it as a mineral loss to secure, and did secure, patent for lands in place limits in Montana.

Exception No. LVI.

The plaintiff excepts to the ruling of the Master on pages 69, 71 and 101 of his report that the Company now has the right to treat the loss mentioned in Exception No. LV as a subsequent loss and substitute a mineral loss for it and thereby increase its subsequent losses to that extent.

For grounds for this exception, the plaintiff says:

[776]

(a) Such substitution is contrary to law and not within the rights of the Company.

(b) The Master bases such ruling upon his assertion (p. 71), "The government has indicated no objection to these incidental substitutions", which is an error for that the plaintiff requested the finding set forth in Exception LV, cross examined the witness Schwarm thereon (Tr. 768 to 771), and clearly stated its position at the trial (Tr. 772), and in its printed brief, pages 12-14.

(c) Such loss was treated as a mineral loss (Witness Schwarm, Tr. 770). Selections of place lands were made thereon as such, and such selections approved.

Grant of 1870.

Authorization of Second Indemnity Limits.

Exception No. LVII.

The plaintiff excepts to the conclusion of the Master on page 150 of his report that "It is concluded the Joint Resolution of May 31, 1870, authorized the laying down of second indemnity limits in Washington in event of deficiency at final location", for the reason said conclusion is erroneous in that the Joint Resolution which authorized a second indemnity belt of ten miles "beyond the limits prescribed in (the) charter", does not authorize such belt opposite the new line from Portland to Puget Sound, the construction of which was author-

ized by the said Joint Resolution and not by the charter Act of July 2, 1964.

Both Grants.

Exception No. LVIII.

The plaintiff excepts to the conclusion of the Master (c) on page 150 of his report to the effect that the Northern Pacific Railway Company may designate and have compensation for any withdrawn lands in the grant of 1864, and to the conclusion of the Master (e), page 153, that the Company may designate and have [777] compensation for any withdrawn land in the grant of 1870, and to the conclusions that the withdrawals mentioned were invalid. For grounds of this exception plaintiff says:

(a) The Railroad Company and the Railway Company have breached the contract by which said grants were made in the respects pointed out in plaintiff's amended bill of complaint and have been guilty of fraud and unconscionable conduct in the performance of said contract.

(b) The Company did not construct the road contemplated by the contract, nor was the road as the same was constructed, completed within the time limited in the contract.

(c) Matters and facts alleged in plaintiff's amended bill of complaint show that the Com-

pany is not entitled in law or in equity to compensation for any of such withdrawn lands.

Respectfully submitted,

J. CRAWFORD BIGGS
E. E. DANLY
NORMAN M. LITTELL
WALTER L. POPE
Special Assistants to the Attorney General.

Dated August 13, 1937. [778]

RETURN ON SERVICE OF EXCEPTIONS.

United States of America,
Eastern District of Washington—ss.

I hereby certify and return that I served the annexed exceptions of the United States to the Report of the Special Master filed on July 26, 1937, upon F. J. McKevitt, Solicitor for the Defendants Northern Pacific Railway Company, Northern Pacific Railroad Company, Northwestern Improvement Company, Bankers Trust Company, Guaranty Trust Company and City Bank Farmers Trust Company; by handing to and leaving a true and correct copy thereof with said F. J. McKevitt personally, at Spokane, in said District on the 13th day of August, A. D. 1937.

WAYNE BEZONA
U. S. Marshal.

By.....
Deputy.

[Endorsed]: Filed Aug. 13, 1937. [779]

[Title of District Court and Cause.]

MOTION ON BEHALF OF THE NORTHERN PACIFIC RAILROAD COMPANY TO EXTEND TIME TO FILE EXCEPTIONS TO COMMISSIONER'S REPORT.

Now comes Charles E. Schmidt, George Landell, executor of E. A. Landell, deceased, Clarence Lobenthal, trustee of Bernard Lobenthal, and Walter L. Haenhlen, on behalf of themselves and all other minority stockholders of the Northern Pacific Railroad Company and move the Court to extend the time within which the said Northern Pacific Railroad Company may file exceptions to the report of Commissioner F. H. Graves for a period of thirty days in addition to the time allowed by the rules and by the report.

These movants are filing this on behalf and for the benefit of the Northern Pacific Railroad Company, for which said Railroad company the said movants are preparing and will within a few days file an answer for and on behalf of the said Northern Pacific Railroad Company in this suit.

ROBERT L. EDMISTON
THOMAS BOYLAN
HUDSON & HUDSON
Attorneys for Movants.

Aug. 28, 1937. Copy Received.
F. J. McKEVITT
J. M. SIMPSON
by E. W.

[Endorsed]: Filed Aug. 25, 1937. [780]

[Title of District Court and Cause.]

ANSWER AND CROSS BILL OF THE NORTHERN PACIFIC RAILROAD COMPANY BY CHARLES E. SCHMIDT AND OTHER MINORITY STOCKHOLDERS OF SAID RAILROAD COMPANY.

Now comes the Northern Pacific Railroad Company by Charles E. Schmidt, George Landell, executor of E. A. Landell, deceased, Clarence Loebenthal, trustee of Bernard Lobenthal, and Walter L. Haenhlen, holders and owners of common and preferred stock of the said Northern Pacific Railroad Company, on behalf of themselves and all others similarly situated of whom the holders of approximately 30,000 shares of said stock are cooperating with these, being practically all of the stock of said railroad company except that which is in possession of the Northern Pacific Railway Company, whether cancelled or owned by said railway company these defendants do not have sufficient knowledge to allege, and for separate answer and cross bill to the bill of complaint as amended and to the answer of the said other defendants herein says:

First. The parties as minority stockholders filing this answer and cross bill on behalf of the said Northern Pacific Railroad Company, hereinafter called the railroad company, are enumerated below. All of the said individual minority stock- [781] holders are over the age of 21 years, are residents

of the State of Pennsylvania and own and hold common and/or preferred stock of said Northern Pacific Railroad Company as follows:

(a) George Landell is the duly appointed and qualified executor of the Estate of the late E. A. Landell, and said E. A. Landell owned at the time of his death and there has come into the hands of the executor, which he now owns and holds, 200 shares of said common stock of said railroad company, being certificates No. A 42067 and A 42068 for 100 shares each, dated June 13, 1890.

(b) Clarence Loebenthal is the duly appointed and qualified trustee for Bernard Loebenthal, and owns and holds 1500 shares of the common stock of said railroad company, being certificates No. A 56090 to A 56104 inclusive for 100 shares each, dated December 30, 1901.

(c) Charles E. Schmidt is the owner and holder of 200 shares of the preferred stock of the said railroad company, being certificates No. 54792 and 54793 for 100 shares each, dated July 31, 1893, which were issued in the name of J. P. Paulding and Co. and duly assigned to Charles E. Schmidt.

(d) Walter L. Haehnlen is the owner and holder of 121 shares of preferred and 240 shares of common stock of the said railroad company, of which 65 shares of the common were derived from certificates No. A 55983 for 100 shares dated February 7, 1898 in the name of Brice, Monges and Company and duly assigned to Walter L. Haehnlen, and certificate No. B 8738 for 15 shares dated August 14,

1883 in the name of Samuel Forsyth; of which 100 shares of the common were derived from certificates No. B 21743 for 20 shares dated August 14, 1893 in the name of DeHaven & Townsend and duly assigned to Walter L. Haehnlen, certificate No. B 22104 for 15 shares dated September 2, 1893 in the name of Dehaven & Townsend and duly assigned to Walter L. [782] Haehnlen, certificate No. B 21923 for 55 shares dated August 22, 1893 in the name of DeHaven & Townsend and duly assigned to Walter L. Haehnlen, certificate No. C 12011 for 10 shares dated August 30 1893 in the name of DeHaven & Townsend and duly assigned to Walter L. Haehnlen and certificate No. A 56134 for 100 shares dated September 22, 1902 in the name of Joseph I. Keefe and duly assigned to Walter L. Haehnlen; of which 50 shares of common were derived from certificate No. A 49237 for 100 shares dated November 4, 1892 in the name of Patrick Cunningham and duly assigned to Walter L. Haehnlen; of which 15 shares of the preferred is the original certificate No. 051461 issued in the name of Jacob Witmer, dated June 2, 1891 and duly assigned to Walter L. Haehnlen; of which 50 shares of preferred were derived from certificates No. 56503 and 56504 for 100 shares each in the name of Katharine M. Lewis, dated June 14, 1906, and No. 059271 for 12 shares, dated June 14, 1906 in the name of Katharine M. Lewis and duly assigned to Walter L. Haehnlen. [783]

Second. This answer and cross bill is on behalf of the Northern Pacific Railroad Company and the

minority stockholders of the said Northern Pacific Railroad Company above mentioned and hereinafter described and all other common and preferred stockholders of the said railroad company who may join herein and share the costs of the suit to redress, restrain or avoid the effect of certain unlawful and wrongful acts had, done and threatened which have resulted in and will result in damage and injuries to the said railroad company and the complainants and all other holders of the common and preferred stock of the said railroad company hereinafter in the cross bill portion more particularly and in detail averred and to that end to vacate and set aside all unlawful acts and actions had and done and to declare the rights of all parties and to redress all wrongs and to enjoin and restrain all further and proposed unlawful acts and deeds. One of the principal bases of the answer and cross bill is to restore to the said railroad company all its rights, privileges, franchises, properties, money and assets, free and clear of all encumbrances, interference or management of and by the said Northern Pacific Railway Company, hereinafter called the railway company, and to release the said railroad company from the captivities which it has been put into and held under by the wrongful and unlawful acts of the said railway company and the officers and officials of the said railway company and the said railroad company as hereinafter set out and to declare, decree and enforce all the rights of the said railroad company and of these minority stock-

holders and all others in a similar position and of all of the said defendants and of all other persons interested as provided and mandatorily required in the Act of Congress approved June 5, 1929, sections 5 and 6, amending the act of July 2, 1864, and the Joint Resolution of May 31, 1870 (46 Stats. 355) as provided in part as follows: [784]

> "Sec. 5. * * * In the judicial proceedings contemplated by this Act there shall be presented, and the court or courts shall consider, make findings relating to, and determine to what extent the terms, conditions, and covenants, expressed or implied, in said granting Acts have been performed by the United States, and by the Northern Pacific Railroad Company, or its successors, including the legal effect of the foreclosure of any and all mortgages which said Northern Pacific Railroad Company claims to have placed on said granted lands by virtue of authority conferred in said resolution of May 31, 1870 and the extent to which said proceedings and foreclosures meet the requirements of said resolution with respect to the disposition of said granted lands, and relative to what lands, if any, have been wrongfully or erroneously patented or certified to said companies, or either of them, as the result of fraud, mistake of law, or fact, or through legislative or administrative misapprehension as to the proper construction of said grants or Acts supplemental or relating thereto, or otherwise, and

the United States and the Northern Pacific Railroad Company, or the Northern Pacific Railway Company, or any other proper person, shall be entitled to have heard and determined by the court all questions of law and fact, and all other claims and matters which may be germane to a full and complete adjudication of the respective rights of the United States and said companies, or their successors in interest under said Act of July 2, 1864, and said joint resolution of May 31, 1870, and in other Acts or resolutions supplemental thereto, and all other questions of law and fact presented to the joint congressional committee appointed under authority of the joint resolution of Congress of June 5, 1924 (Forty-third Statutes, page 461), notwithstanding that such matters may not be specifically mentioned in this enactment." * * *

"Sec. 6. * * * To carry out this enactment the court may render such judgments and decrees as law and equity may require."

Third. The facts alleged in the bill of complaint as amended are insufficient to constitute any valid cause of action in equity, save for expropriation of indemnity lands in national forests and other government reservations.

Defendant prays that all of said bill of complaint be dismissed except subdivisions I, II, III, V, the first two paragraphs of IX, the third paragraph of

X, XVI, XVII, XX, XXI, XXXVII, and the first sub-paragraph of paragraph (1) of subdivision XLII.

I.

This defendant railroad company admits the allegations of Paragraph 1 of the amended bill except so far as they are contradicted or denied hereinafter in the cross bill. [785]

II.

This defendant railroad company admits the allegations of Paragraph 2 of the amended bill except so far as they are contradicted or denied hereinafter in the cross bill.

III.

This defendant railroad company admits the allegations of Paragraph 3 of the amended bill except so far as they are contradicted or denied hereinafter in the cross bill.

IV.

This defendant railroad company admits the allegations of Paragraph 4 of the amended bill except so far as they are contradicted or denied hereinafter in the cross bill.

V.

This defendant railroad company admits the allegations of Paragraph 5 of the amended bill except so far as they are contradicted or denied hereinafter in the cross bill.

VI.

These minority stockholders and this defendant railroad company are advised that it is not necessary to answer the sixth paragraph of the amended bill as a demurrer thereto was sustained and it was dismissed.

VII.

These minority stockholders and this defendant railroad company are advised that it is not necessary to answer the seventh paragraph of the amended bill as a demurrer thereto was sustained and it was dismissed.

VIII.

These minority stockholders and this defendant railroad company are advised that it is not necessary to answer the eighth paragraph of the amended bill as a demurrer thereto was sustained and it was dismissed. [786]

IX.

This defendant railroad company admits the allegations of the first two paragraphs of Paragraph 9 of the amended bill except so far as they are contradicted or denied hereinafter in the cross bill.

As to the remaining portion of Paragraph 9 of the amended bill these minority stockholders and this defendant railroad company are advised that it is not necessary to answer same as a demurrer to same has been sustained and they were dismissed from the amended bill.

X.

This defendant railroad company denies the validity of the so-called mortgages and so-called foreclosure alleged in Paragraph 3 of Paragraph 10 of the amended bill and the other allegations of said paragraph are fully answered by the allegations of the cross bill herein.

These minority stockholders and this defendant railroad company are advised that it is not necessary to answer the remaining allegations of Paragraph 10 of the amended bill as a demurrer thereto has been sustained and they were dismissed from the bill.

XI.

These minority stockholders and this defendant railroad company are advised that it is not necessary to answer the eleventh paragraph of the amended bill as a demurrer thereto was sustained and it was dismissed.

XII.

These minority stockholders and this defendant railroad company are advised that it is not necessary to answer the twelfth paragraph of the amended bill as a demurrer thereto was sustained and it was dismissed.

XIII.

These minority stockholders and this defendant railroad com- [787] pany are advised that it is not necessary to answer the thirteenth paragraph of

the amended bill as a demurrer thereto was sustained and it was dismissed.

XIV.

These minority stockholders and this defendant railroad company are advised that it is not necessary to answer the fourteenth paragraph of the amended bill as a demurrer thereto was sustained and it was dismissed.

XV.

These minority stockholders of this defendant railroad company are advised that it is not necessary to answer the fifteenth paragraph of the amended bill as a demurrer thereto was sustained and it was dismissed.

XVI.

This defendant railroad company admits the allegations of Paragraph 16 of the amended bill except so far as they are contradicted or denied hereinafter in the cross bill.

XVII.

This defendant neither admits nor denies but calls for strict proof of the allegations of Paragraph 17 of the amended bill, as the minority stockholders filing this answer have not at the present time sufficient knowledge of all the facts on which to base an answer.

XVIII.

These minority stockholders and this defendant railroad company are advised that it is not neces-

sary to answer the eighteenth paragraph of the amended bill as a demurrer thereto was sustained and it was dismissed.

XIX.

These minority stockholders and this defendant railroad company are advised that it is not necessary to answer the nineteenth [788] paragraph of the amended bill as a demurrer thereto was sustained and it was dismissed.

XX.

This defendant neither admits nor denies but calls for strict proof of Paragraph 20 of the amended bill, as the minority stockholders have not at the present time sufficient knowledge of all the facts on which to base an answer, but this defendant railroad company is informed, believes and denies that the said errors of law and fact were in anyway induced by any act or deed of this defendant, Northern Pacific Railroad Company, or the so-called defendant Northern Pacific Railway Company, and denies as a consequence of said erorrs or in any other way either the said railroad company or the so-called railway company has received more land than it, said Railroad Company, is entitled to receive under said grant. The Secretary of Interior has made other errors of law and fact, which have denied to this defendant railroad company the right to receive large areas of land to which it is justly entitled. This defendant railroad company denies that any claim upon its behalf is being or has been wrongfully asserted.

XXI.

These minority stockholders on behalf of the defendant railroad company being without knowledge of all the allegations of Paragraph 21 of the amended bill, as these minority stockholders have not access to the files and records of the so-called Northern Pacific Railway Company, and not yet having been able to examine the files and records of this defendant railroad company, are informed, believe and so allege that the answer of the so-called railway company is fairly accurate except as to claims by the said so-called Northern Pacific Railway Company for and on its own behalf, which are contrary to the allegations of the cross bill part of this answer and except as to such other allegations which are contrary to [789] the said cross bill and leave is asked and reserved to answer further to the said Paragraph 21 of the amended bill after these minority stockholders have examined the files and records of the defendant railroad company and the so-called railway company.

XXII.

These minority stockholders on behalf of the defendant railroad company being without knowledge of all the allegations of Paragraph 22 of the amended bill, as these minority stockholders have not access to the files and records of the so-called Northern Pacific Railway Company, and not yet having been able to examine the files and records of this defendant railroad company, are informed, believe and so

allege that the answer of the so-called railway company is fairly accurate except as to claims by the said so-called Northern Pacific Railway Company for and on its own behalf, which are contrary to the allegations of the cross bill part of this answer and except as to such other allegations which are contrary to the said cross bill. This defendant railroad company alleges that as to any and all land alleged in Paragraph 22 of the amended bill as having been patented to the so-called railway company, such patent was illegal and void for the reasons set out in the hereinafter cross bill and said patent should be cancelled and the lands then patented to this defendant railroad company, and leave is asked and reserved to answer further to the said Paragraph 22 of the amended bill after these minority stockholders have examined the files and records of the defendant railroad company and the so-called railway company.

XXIII.

These minority stockholders on behalf of the defendant railroad company, being without knowledge of all the allegations of Paragraph 23 of the amended bill, as these minority stockholders [790] have not access to the files and records of the so-called Northern Pacific Railway Company, and not yet having been able to examine the files and records of this defendant railroad company, are informed, believe and so allege that the answer of the so-called railway company is fairly accurate except as to

claims by the said so-called Northern Pacific Railway Company for and on its own behalf, which are contrary to the allegations of the cross bill part of this answer and except as to such other allegations which are contrary to the said cross bill. This defendant railroad company alleges that as to any and all land alleged in Paragraph 23 of the amended bill as having been patented to the so-called railway company, such patent was illegal and void for the reasons set out in the hereinafter cross bill and said patent should be cancelled and the lands then patented to this defendant railroad company, and leave is asked and reserved to answer further to the said Paragraph 23 of the amended bill after these minority stockholders have examined the files and records of the defendant railroad company and the so-called railway company.

XXIV.

These minority stockholders on behalf of the defendant railroad company, being without knowledge of all the allegations of Paragraph 24 of the amended bill, as these minority stockholders have not access to the files and records of the so-called Northern Pacific Railway Company, and not yet having been able to examine the files and records of this defendant railroad company, are informed, believe and so allege that the answer of the so-called railway company is fairly accurate except as to claims by the said so-called Northern Pacific Railway Company for and on its own behalf, which are

contrary to the allegations of the cross bill part of this answer and except as to such other allegations which are contrary to the said cross bill. This defendant railroad company alleges that as to any and all land alleged in Paragraph 24 of the amended bill as having [791] been patented to the so-called railway company, such patent was illegal and void for the reasons set out in the hereinafter cross bill and said patent should be cancelled and the lands then patented to this defendant railroad company, and leave is asked and reserved to further answer to the said Paragraph 24 of the amended bill after these minority stockholders have examined the files and records of the defendant railroad company and the so-called railway company.

XXV.

These minority stockholders on behalf of the defendant railroad company being without knowledge of all the allegations of Paragraph 25 of the amended bill, as these minority stockholders have not access to the files and records of the so-called Northern Pacific Railway Company, and not yet having been able to examine the files and records of this defendant railroad company, are informed, believe and so allege that the answer of the so-called railway company is fairly accurate except as to claims by the said so-called Northern Pacific Railway Company for and on its own behalf, which are contrary to the allegations of the cross bill part of this answer and except as to such other allegations

which are contrary to the said cross bill. This defendant railroad company alleges that as to any and all land alleged in Paragraph 25 of the amended bill as having been patented to the so-called railway company, such patent was illegal and void for the reasons set out in the hereinafter cross bill and said patent should be cancelled and the lands then patented to this defendant railroad company, and leave is asked and reserved to answer further to the said Paragraph 25 of the amended bill after these minority stockholders have examined the files and records of the defendant railroad company and the so-called railway company.

XXVI.

These minority stockholders and this defendant railroad [792] company are advised that it is not necessary to answer the twenty-sixth paragraph of the amended bill as a demurrer thereto was sustained and it was dismissed.

XXVII.

These minority stockholders and this defendant railroad company are advised that it is not necessary to answer the twenty-seventh paragraph of the amended bill as a demurrer thereto was sustained on application of the plaintiff, and it was dismissed.

XXVIII.

These minority stockholders and this defendant railroad company are advised that it is not necessary to answer the twenty-eighth paragraph of the

amended bill as a demurrer thereto was sustained and it was dismissed.

XXIX.

The copy of the decree of this Court of October 3, 1935 which these minority stockholders have states that paragraph or sub-division "XXIX" was dismissed and this defendant is advised that it is not necessary to answer any portions of the said Paragraph 29 of the bill that was so dismissed on the demurrer being sustained.

These minority stockholders on behalf of the defendant railroad company, being without knowledge of all the allegations of Paragraph 29 of the amended bill, as these minority stockholders have not access to the files and records of the so-called Northern Pacific Railway Company, and not yet having been able to examine the files and records of this defendant railroad company, are informed, believe and so allege that the answer of the so-called railway company is fairly accurate except as to claims by the said so-called Northern Pacific Railway Company for and on its own behalf, which are contrary to the allegations of the cross bill part of this answer and except as to such other allegations which are contrary to the said cross bill. This defendant railroad company alleges that as to any [793] and all land alleged in Paragraph 29 of the amended bill as having been patented to the so-called railway company, such patent was illegal and void for the reasons set out in the hereinafter cross

bill and said patent should be cancelled and the lands then patented to this defendant railroad company and leave is asked and reserved to answer further to the said Paragraph 29 of the amended bill after these minority stockholders have examined the files and records of the defendant railroad company and the so-called railway company.

XXIX-a.

These minority stockholders on behalf of the defendant railroad company, being without knowledge of all the allegations of Paragraph 29-a of the amended bill, as these minority stockholders have not access to the files and records of the so-called Northern Pacific Railway Company, and not yet having been able to examine the files and records of this defendant railroad company, are informed, believe and so allege that the answer of the so-called railway company is fairly accurate except as to claims by the said so-called Northern Pacific Railway Company for and on its own behalf, which are contrary to the allegations of the cross bill part of this answer and except as to such other allegations which are contrary to the said cross bill. This defendant railroad company alleges that as to any and all land alleged in Paragraph 29-a of the amended bill as having been patented to the so-called railway company, such patent was illegal and void for the reasons set out in the hereinafter cross bill and said patent should be cancelled and the lands then patented to this defendant railroad com-

pany, and leave is asked and reserved to answer further to the said Paragraph 29-a of the amended bill after these minority stockholders have examined the files and records of the defendant railroad company and the so-called railway company.

XXX.

These minority stockholders and this defendant railroad company are advised that it is not necessary to answer the thirtieth paragraph [794] of the amended bill as a demurrer thereto was sustained and it was dismissed.

XXXI.

These minority stockholders and this defendant railroad company are advised that it is not necessary to answer the thirty-first paragraph of the amended bill as a demurrer thereto was sustained and it was dismissed.

XXXII.

These minority stockholders and this defendant railroad company are advised that it is not necessary to answer the thirty-second paragraph of the amended bill as a demurrer thereto was sustained and it was dismissed.

XXXIII.

These minority stockholders and this defendant railroad company are advised that it is not necessary to answer the thirty-third paragraph of the amended bill as a demurrer thereto was sustained and it was dismissed.

XXXIV.

These minority stockholders on behalf of the defendant railroad company, being without knowledge of all the allegations of Paragraph 34 of the amended bill, as these minority stockholders have not access to the files and records of the so-called Northern Pacific Railway Company, and not yet having been able to examine the files and records of this defendant railroad company, are informed, believe and so allege that the answer of the so-called railway company is fairly accurate except as to claims by the said so-called Northern Pacific Railway Company for and on its own behalf, which are contrary to the allegations of the cross bill part of this answer and except as to such other allegations which are contrary to the said cross bill. This defendant railroad company alleges that as to any and all land alleged in Paragraph 34 of the amended bill as having been patented to the so-called railway company, such patent was illegal and void [795] for the reasons set out in the hereinafter cross bill and said patent should be cancelled and the lands then patented to this defendant railroad company, and leave is asked and reserved to answer further to the said Paragraph 34 of the amended bill after these minority stockholders have examined the files and records of the defendant railroad company and the so-called railway company.

XXXV.

These minority stockholders and this defendant railroad company are advised that it is not neces-

sary to answer the thirty-fifth paragraph of the amended bill as a demurrer thereto was sustained and it was dismissed.

XXXVI.

These minority stockholders and this defendant railroad company are advised that it is not necessary to answer the thirty-sixth paragraph of the amended bill as a demurrer thereto was sustained and it was dismissed.

XXXVII.

These minority stockholders on behalf of the defendant railroad company, being without knowledge of all the allegations of Paragraph 37 of the amended bill, as these minority stockholders have not access to the files and records of the so-called Northern Pacific Railway Company, and not yet having been able to examine the files and records of this defendant railroad company, are informed, believe and so allege that the answer of the so-called railway company is fairly accurate except as to claims by the said so-called Northern Pacific Railway Company for and on its own behalf, which are contrary to the allegations of the cross bill part of this answer and except as to such other allegations which are contrary to the said cross bill. This defendant railroad company alleges that as to any and all land alleged in Paragraph 37 of the amended bill as having been patented to the so-called railway company such patent was illegal and void for the

reasons set out in the hereinafter cross bill and [796] said patent should be cancelled and the lands then patented to this defendant railroad company, and leave is asked and reserved to answer further to the said Paragraph 37 of the amended bill after these minority stockholders have examined the files and records of the defendant railroad company and the so-called railway company.

XXXVIII.

These minority stockholders and this defendant railroad company are advised that it is not necessary to answer the thirty-eighth paragraph of the amended bill as a demurrer thereto was sustained and it was dismissed.

XXXIX.

These minority stockholders on behalf of the defendant railroad company, being without knowledge of all the allegations of Paragraph 39 of the amended bill, as these minority stockholders have not access to the files and records of the so-called Northern Pacific Railway Company, and not yet having been able to examine the files and records of this defendant railroad company, are informed, believe and so allege that the answer of the so-called railway company is fairly accurate except as to claims by the said so-called Northern Pacific Railway Company for and on its own behalf, which are contrary to the allegations of the cross bill part of this answer and except as to such other allegations

which are contrary to the said cross bill. This defendant railroad company alleges that as to any and all land alleged in Paragraph 39 of the amended bill as having been patented to the so-called railway company, such patent was illegal and void for the reasons set out in the hereinafter cross bill and said patent should be cancelled and the lands then patented to this railroad company.

Further answering Paragraph 39 of the bill this defendant railroad company states that all of the stock of the Northwestern [797] Improvement Company held by the said so-called Northern Pacific Railway Company was, in truth and in fact, the property of this defendant railroad company and was, in fact, wrongfully taken possession of seized by the said so-called railway company and kept from and withheld from this defendant railroad company as well as all other stocks, bonds, monies, leases, royalties and lands received by the said so-called Northern Pacific Railway Company, all of which acts of the said so-called Northern Pacific Railway Company are wrongful, illegal and unlawful, as does more fully appear in the cross bill herewith. Leave is asked and reserved to answer further to the said Paragraph 39 of the amended bill after these minority stockholders have examined the files and records of the defendant railroad company and the so-called railway company.

XL.

These minority stockholders on behalf of the defendant railroad company, being without knowl-

edge of all the allegations of Paragraph 40 of the amended bill, as these minority stockholders have not access to the files and records of the so-called Northern Pacific Railway Company, and not yet having been able to examine the files and records of this defendant railroad company, are informed, believe and so allege that the answer of the so-called railway company is fairly accurate except as to claims by the said so-called Northern Pacific Railway Company for and on its own behalf, which are contrary to the allegations of the cross bill part of this answer and except as to such other allegations which are contrary to the said cross bill. This defendant railroad company alleges that as to any and all land alleged in Paragraph 40 of the amended bill as having been patented to the so-called railway company, such patent was illegal and void for the reasons set out in the hereinafter cross bill and said patent should be cancelled and the lands then patented to this railroad company. [798]

Further answering Paragraph 40 of the amended bill this defendant railroad company states that all of the stock of the Northwestern Improvement Company held by the said so-called Northern Pacific Railway Company, was, in truth and in fact, the property of this defendant, railroad company and was, in fact, wrongfully taken possession of, seized by the said so-called railway company and kept from and withheld from this defendant railroad company as well as all other stocks, bonds, monies, leases, royalties and lands received by the

said so-called Northern Pacific Railway Company, all of which acts of the said so-called Northern Pacific Railway Company are wrongful, illegal and unlawful, as does more fully appear in the cross bill herewith. Leave is asked and reserved to answer further to the said Paragraph 40 of the amended bill after these minority stockholders have examined the files and records of the defendant railroad company and the so-called railway company.

XLI.

These minority stockholders on behalf of the defendant railroad company being without knowledge of all the allegations of Paragraph 41 of the amended bill, as these minority stockholders have not access to the files and records of the so-called Northern Pacific Railway Company, and not yet having been able to examine the files and records of this defendant railroad company, are informed, believe and so allege that the answer of the so-called railway company is fairly accurate except as to claims by the said so-called Northern Pacific Railway Company for and on its own behalf, which are contrary to the allegations of the cross part of this answer and except as to such other allegations which are contrary to the said cross bill. This defendant railroad company alleges that as to any and all land alleged in Paragraph 41 of the amended bill as having been patented to the so-called railway company, such patent was illegal and void [799] for the reasons set out in the hereinafter cross bill and

said patent should be cancelled and the lands then patented to this railroad company.

Further answering Paragraph 41 of the bill this defendant railroad company states that all of the stock of the Northwestern Improvement Company held by the said so-called Northern Pacific Railway Company was, in truth and in fact, the property of this defendant railroad company and was, in fact, wrongfully taken possession of, seized by the said so-called railway company and kept from and withheld from this defendant railroad company as well as all other stocks, bonds, monies, leases, royalties and lands received by the said so-called Northern Pacific Railway Company, all of which acts of the said so-called Northern Pacific Railway Company are wrongful, illegal and unlawful, as does more fully appear in the cross bill herewith. Leave is asked and reserved to answer further to the said Paragraph 41 of the amended bill after these minority stockholders have examined the files and records of the defendant railroad company and the so-called railway company.

XLII.

This defendant railroad company, answering Paragraph 42 of the amended bill denies that the plaintiff is entitled to any relief but admits that a suit in equity is the only remedy by which the plaintiff could seek relief. [800]

XLIII.

This defendant railroad company by way of cross bill and seeking affirmative relief alleges as follows:

That this defendant, the said Northern Pacific Railroad Company, hereinafter referred to as the railroad company, was duly created and organized under the Act of Congress of July 2, 1864 (13 Stats. 365) and acts amendatory thereof and the charter and franchise and all rights, powers, privileges and property provided for by said acts were duly accepted and received by the incorporators and the said railroad company, in accordance with the said acts, duly and regularly organized and proceeded with the erection and construction and completion of the railroad lines in said acts provided for truly and faithfully in accordance with the provisions and conditions of said act, and the said railroad lines, as so constructed, were duly and properly accepted and confirmed by the President of the United States and officials of the government of the United States as required by the provisions and conditions of said act. The said railroad company maintained and operated the said line of railroad under and in accordance with the said statutes until the year 1893 with possibly the exception of the period from the 16th day of April, 1875 to March 22, 1882, during part of which period there was a null and void receivership and what might be termed an operating committee, all of which is more fully hereinafter set forth showing all the unlawful acts and wrongs committed against the said railroad company.

XLIV.

The so-called foreclosure proceeding of 1875, being the equity suit in the United States Circuit

Court for the Southern District of New York filed the 16th day of April, 1875, was not only not a foreclosure, but the defendant railway company now admits and contends that it was not a foreclosure and it is now [801] estopped to claim that it was a foreclosure, and the United States and the other defendants, because of their acts as set out in this record and exhibits and in this answer and cross bill, are likewise estopped to assert that there was a foreclosure in the said proceedings in 1875 of the mortgage executed July 1, 1870 (being Exhibit F to the amended bill, volume 1, page 11 of the printed exhibit), which is referred to and made a part hereof. In the said suit, which is entitled Jay Cooke, et als. vs. Northern Pacific Railroad Company, as shown on the face of the record, the Court did not have jurisdiction of the subject matter nor of the parties nor of the property involved, and the United States was not made a party to said suit. Thus, the proceedings, decrees and actions taken, had and done in said suit are absolutely null and void on the face of the record and beyond the power and jurisdiction of said court and of no effect, and the said mortgage of July 1, 1870 is in full force and effect and is still a lien in fact and on the public record on all the property, assets, rights and franchises of the said railroad company mentioned and described in the said mortgage, is unreleased and unsatisfied and the said bonds secured under the said mortgage are in the treasury of the said railroad company as security for the purposes hereinafter stated and set

forth; that the said mortgage of July 1, 1870 is the only mortgage the United States ever authorized the Northern Pacific Railroad Company to execute and the Act of July 2, 1864 and the Joint Resolution of May 31, 1870 prohibited and forbid any other mortgages being executed by the said railroad company without the consent of Congress and all other purported mortgages and bond issues thereafter claimed to be issued and in effect and which are described and set out in the proceedings in this suit are ultra vires, forbidden by statute, null and void, are not binding and are without force and effect and are not a lien upon any of the [802] property of the said railroad company known as the Northern Pacific Railroad System and its franchises, rights and privileges. Said mortgage was by the said railroad, through its proper officers, duly and formally re-affirmed and declared on May 3, 1895 by deed in the following words and figures:

> "Whereas the 1st day of July, 1870, the Northern Pacific Railroad Co., a corporation created by and existing under the laws of the Congress of the United States, as therein referred to, did execute their certain deed of trust or mortgage, wherein and whereby it was provided that said Northern Pacific Railroad Co. should execute, deliver, and acknowledge all such further deeds, conveyances, and assurances in law for the better assuring unto the trustees and their successors, etc., as in said trust deed is set forth, reference to which is

hereby made, especially to section 15; Therefore be it

Resolved, That this corporation do forthwith execute, deliver and acknowledge to said trustees or their successors such further deeds, conveyances, and assurances in the law for the better assuring unto the said trustees or their successors in said trust therein expressed the lands, railway, equipment and appurtenances, hereinbefore mentioned, or intended so to be. as in said deed of trust is mentioned, and especially in said section 15, and be it further

Resolved, That the president and secretary do execute such further assurances, deeds, and conveyances as to said trustees or their successors or their counsel may seem proper, and in accordance with such trust deed; and that the president and secretary do acknowledge and seal the same in the usual form and deliver the same to said trustees or their successors for record and filing; and be it further

Resolved, That the draft of the instrument of further assurance herewith exhibited is in proper form and should be forthwith executed by this company in due form of law.

(The following is the draft of the deed of further assurances)

This indenture made the twenty-seventh day of April, one thousand eight hundred and seventy-five, by and between "The Northern Pacific Railroad Company", a corporation created

by and existing under the laws of the United States of America, party of the first part, and Jay Cooke and Charlemagne Tower, the trustees named in or at present existing under a certain mortgage or deed of trust heretofore made by said "The Northern Pacific Railroad Company" bearing date the first day of July, one thousand eight hundred and seventy, parties of the second part: Witnesseth—

Whereas heretofore the said "The Northern Pacific Railroad Company" executed, acknowledged, and delivered its certain mortgage or deed of trust bearing the date the first day of July, one thousand eight hundred and seventy wherein and whereby it conveyed in trust nevertheless and for the uses and purposes and upon the trusts herein contained, all the property of the said company of every [803] kind, nature, and description, both real and personal and mixed, corporeal or incorporeal, to Jay Cooke and John Edgar Thompson, and whereas in said deed of trust or mortgage there was a provision in the words and figures following, to wit:

'Article fifteenth. The party of the first part shall from time to time and at all times hereafter, and as often as thereunto requested by the trustees, execute, deliver, and acknowledge all such further deeds, conveyances, and assurances in the law for the better assuring unto the trustees and their successors in the trust hereby created, upon the trusts herein ex-

pressed, the lands, railway, equipments, and appurtenances hereinbefore mentioned or intended so to be, and all other property and things whatsoever, which may be hereafter acquired for use in connection with the same, or any part thereof, and all franchises now held, including the franchise to be a corporation as by the trustees or the survivors or survivor of them, or their successors, or by their or his counsel, learned in the law, shall be reasonably advised, devised or required; and the party of the first part shall furnish to the party of the second part, from time to time upon their reasonable request in writing a true and full inventory of all the movable property appertaining to the said railroad and the operations thereof, and which is transferred by this indenture; but no default to demand or to furnish such inventory shall impair the operation or effect of this indenture upon all or any of the property herein agreed to be transferred.'

Now, therefore, in order the more effectually to carry out the provisions of said deed of trust or mortgage and in consideration of the premises and of one dollar the said party of the first part by said Jay Cooke and said Charlemagne Tower in hand paid, the receipt of which is hereby acknowledged, the said "The Northern Pacific Railroad Company" has granted, bargained, sold, assigned, transferred, released, conveyed and confirmed, and by these presents,

does grant, bargain, sell, assign, transfer, release, convey and confirm, unto the parties of the second part hereto, in mortgage, and upon the trusts nevertheless in said original deed of trust or mortgage express, the lands, railway equipment and appurtenances in said deed of trust or mortgage mentioned or intended so to be, and all other property and things whatsoever which have been acquired since the execution of said deed of trust or mortgage by said "The Northern Pacific Railroad Company" for use in connection with the same or any part thereof and all franchises by it held then or since acquired, including the franchise to be a corporation.

In witness whereof the party of the first part hereto hath caused its corporate seal to be hereunto affixed and the same to be attested by its president and secretary and the parties of the second part have hereunto set their hands and seals the day and year first above written.

THE NORTHERN PACIFIC
RAILROAD COMPANY
By C. B. WRIGHT,
President
[Seal] SAMUEL WILKESON,
Secretary of the Northern
Pacific R. R. Co.
[Seal] CHARLEMAGNE TOWER [804]

Southern District of New York
City and County of New York, ss:

On this 3d day of May, 1895, before me came C. B. Wright, Samuel Wilkeson, and Charlemagne Tower, to me personally known, and the said C. B. Wright personally known to me to be president of the Northern Pacific Railroad Co., who being by me duly sworn did depose and say that he is president of said company and that he subscribed his name to said certificate by authority of said company and that the seal affixed to the same is the corporate seal of said company, and was affixed thereto by their authority, and he acknowledged to me that he executed the same for the purposes therein mentioned.

And the said Samuel Wilkeson personally known to me to be the treasurer of the said Northern Pacific Railroad Co., who being by me duly sworn did depose and say that he is treasurer of said company; that the seal affixed to the above instrument is the corporate seal of said company, and was affixed thereto by their authority and that he subscribed his name by their authority, and he acknowledged to me that he executed the same for the uses and purposes therein mentioned.

And the said Charlemagne Tower subscribed the same in my presence and acknowledged to

me that he executed the same for the uses and purposes therein mentioned.

R. Q. STILWELL
United States Commissioner for the Southern District of New York"

XLV.

That the reorganization plan of the said railroad company dated June 30, 1875, being Exhibit F-1 to the amended bill (printed exhibits Volume 1, page 23) which is hereby made a part of this bill, was in effect an operating agreement for the committee to operate the railroad and did not change the charter of the railroad company nor in anywise effect the title of the property, franchises and rights of the said railroad company but provided for an agreement by the stockholders without increasing the stock principal, then 1,000,000 shares of the par value of $100 each, but gave the preferred stockholders voting rights under certain circumstances, as therein set out, over the remaining or common stockholders. But the true purport and effect of the said agreement was to give the holders of what was termed preferred stock certain preferential rights for certain times over the other [805] stockholders. This stock was issued to holders of the bonds and other indebtedness so that the bonds could be retired into the treasury of the railroad corporation and for the benefit of and with the intent and purpose of safeguarding and securing the holders of the preferred stock and then the common stock and not

for purposes of cancellation, and in accordance therewith the railroad corporation re-established and re-affirmed said mortgage and bonds by the above set out deed of May 3, 1895.

That the proper construction of the preferred stock is that being thus secured and the said reorganization agreement further providing for the payment of the preferred stock out of sale of certain lands, which would be thereby released from mortgage, the preferred stock is, in effect, the common stock with a preference over other common stock by an agreement between the holders of the preferred and common stock, as is permissible of an interstockholders agreement without changing the charter, or the preferred stock is evidence of indebtedness with an equitable lien on the bonds in the treasury of the railroad company as secured by the mortgage of July 1, 1870.

XLVI.

The deed from Oliver Fiske and Kenneth G. White, master commissioners, to Johnson Livingstone, Frederick Billings, James K. Moorhead, John N. Hutchinson, George Stark and John N. Dennison, committee of bondholders of the Northern Pacific Railroad Company, dated September 17, 1875, Defendant's Exhibit 31, (Hearings before the Joint Congressional Committee, part 1-a, page 714) which is referred to and made a part hereof, purporting to be executed by the said master commissioners under authority of the decree of May 12, 1875 as amended by decree of August 6, 1875 under the so-called pro-

ceedings of 1875, was ultra vires, absolutely null and void and of no effect. [806]

XLVII.

That the deed from George W. Cass, receiver, to Johnson Livingstone and others, committee of bondholders of the Northern Pacific Railroad Company, dated December 28, 1875, Defendant's Exhibit 32 (hearings before the Joint Congressional Committee, part 1-a, page 723) which is referred to and made a part hereof, purporting to be executed by the receiver under authority of the decree of May 12, 1875 as amended August 6, 1875 and the decree of August 25, 1875 under the so-called proceedings of 1875 was ultra vires, absolutely null and void and of no effect.

XLVIII.

The deed from Jay Cooke and Charlemagne Tower, trustees, to Johnson Livingstone and others, committee of bondholders of the Northern Pacific Railroad Company, dated September 27, 1875, Defendant's Exhibit 33 (hearings before the Joint Congressional Committee, part 1-a, page 727) which is referred to and made a part hereof, purporting to be executed by the said trustees under authority of the decree of May 12, 1875 as amended August 6, 1875 under the socalled proceedings of 1875, was ultra vires, absolutely null and void and of no effect.

XLIX.

That the deed from George W. Cass, receiver, and Jay Cooke and Charlemagne Tower, trustees,

to Frederick Billings, dated September 16, 1876, Defendant's Exhibit 34 (hearings before the Joint Congressional Committee, part 1-a, page 735), which is referred to and made a part hereof, purporting to be executed by the receiver and trustees under authority of the decree of April 16, 1875 under the so-called proceedings of 1875, was ultra vires, absolutely null and void and of no effect.

L.

That the deed from the said Frederick Billings to the Northern Pacific Railroad Company, dated December 16, 1876, Defendant's [807] Exhibit 35 (hearings before the Joint Congressional Committee, part 1-a, page 737), which is hereby referred to and made a part hereof, on parts of the property of the said railroad company and similar deeds of the same date between the same parties and other properties set out on page 738 of the hearings before the Joint Congressional Committee, part 1-a, which said deeds are seemingly in pursuance of the deed from Cass, receiver, and others to Billings, are all absolutely null and void, ultra vires and without authority and effect.

LI.

That the deeds in Defendant's Exhibit 36 (hearings before the Joint Congressional Committee, part 1-a, page 737) which are referred to and made a part hereof, were each and all absolutely null and void, ultra vires and without authority and effect, the said Defendant's Exhibit 36 being in the follownig words and figures:

"On the same date, December 16, 1876, there were also executed 9 other conveyances in precisely the same form by George W. Cass, receiver, and Jay Cooke and Charlemagne Tower, trustees, to Frederick Billings of lands as follows: 84,073.68 acres, Becker County, Minnesota, consideration $210,184.20; 147,694.73 acres, Otter Tail County, Minnesota, consideration $369,236.83; 99,926.57 acres, Wadena County, Minnesota, consideration $249,816.83; 17,958.37 acres, Polk County, Minnesota, consideration, $44,895.93; 199,565.02 acres, Clay County, Minnesota, consideration $498,912.55; 44,225.55 acres Todd County, Minnesota, consideration $110,563.87; 8,266.05 acres, Morrison County, Minnesota, consideration $20,665.13; 21,797.31 acres, Aitken County, Minnesota, consideration $54,493.28; 601.91 acres Cass County, Territory of Dakota, consideration $1,504.78."

LII.

That the deeds in Defendant's Exhibit 37 (hearings before the Joint Congressional Committee, part 1-a, page 738) which are referred to and made a part hereof, were each and all absolutely null and void, ultra vires and without authority and effect, the said Defendant's Exhibit 37 being in the following words and figures: [808]

"On the same date, December 16, 1876, there were also executed nine other conveyances in precisely the same form and for the considera-

tion of $1.00 in each instance by Frederick Billings to the Northern Pacific Railroad Company of lands as follows: 84,073.68 acres, Becker County, Minnesota; 147,694.73 acres, Otter Tail County, Minnesota; 99,926.57 acres, Wadena County, Minnesota; 17,958.37 acres, Polk County, Minnesota; 199,565.02 acres, Clay County, Minnesota; 44,225.55 acres, Todd County, Minnesota, 8266.05 acres, Morrison County, Minnesota; 21,797.31 acres, Aitken County, Minnesota; 601.91 acres, Cass County, Territory of Dakota."

LIII

That the deed from Johnson Livingstone and others purporting to be the committee of the bondholders of the Northern Pacific Railroad Company to the Northern Pacific Railroad Company, dated March 22, 1882, Plaintiff's Exhibit 50, Defendant's Exhibit 38 (hearings before the Joint Congressional Committee, part 1-a, pages 731-33) which is referred to and made a part hereof, is absolutely null and void, ultra vires and without authority so far as it is a deed conveying property, rights and franchises which had belonged to and would then still belong to the said railroad company and the only effect, if any, it had would be the termination of the so-called operating agreement of the said railroad system.

LIV

The decree of foreclosure in the proceedings of 1875, before there was any effort to execute it, was suspended and the Court never thereafter permitted

a sale under the foreclosure decree and there was no sale under the foreclosure decree of the lands of the railroad company.

LV

The Act of Congress of July 2, 1864 and the Joint Resolution of May 31, 1870 not only did not give authority to sell but in terms and effect prohibited any sale of the lands and property of the railroad company in foreclosure under the one and only mortgage permitted by the act and resolution to any party other than a Federal corporation, except the lands beyond the right of [809] way, which the act specifically provided for the sale of; this prohibition was for the purpose of preventing the right of way and the properties thereon, with necessary assets and franchises for the operation of same, from passing beyond the control of Congress by the right to amend and thus securing to the United States perpetually an ability to enforce its right for the transportation of the mail and troops and other privileges reserved to the United States under the Act of July 2, 1864 and the Joint Resolution of May 31, 1870; in Northern Pacific Railway Co. vs. Townsend, 190 U. S. 267; 47 L. Ed. 1044, the Court held that the right of way of the Northern Pacific Railroad Company could not be sold and conveyed by the railroad company, and in California vs. Central Pacific Railroad Company and others, 127 U. S. 1; 32 L. ed. 150, the Supreme Court held that a state could not tax a franchise of different railroad companies granted by Congress without the consent of Congress and the Court found as a

fact and stated, "That to facilitate the construction of said road the Government of the United States by said act of Congress adopted the defendant as the instrument or agent of the United States."

LVI

The Missouri Division mortgage of May 1, 1879, Exhibit G to the amended bill (printed exhibits Volume 1, page 30,) which is referred to and made a part hereof, the Pend d'Orielle Division mortgage of September 1, 1879, Exhibit H to the amended bill (printed exhibits Volume 1, page 47), which is hereby referred to and made a part hereof, General First Mortgage of January 1, 1881, Exhibit I to the amended bill (printed exhibits Volume 1, page 63) which is hereby referred to and made a part hereof, were all executed prior to the deed of March 22, 1882, defendant railway's exhibit 50, from the said so-called operating committee to the said railroad [810] company and if they are to be construed to be the acts and deeds of the said operating committee they in nowise affect the said railroad company or its property. They are inoperative and ineffective, not a lien upon the property, franchises or rights of the said railroad company. The General Second Mortgage of November 20, 1883, Exhibit J to the amended bill, page 87, the Third Mortgage of December 1, 1887, Exhibit K to the amended bill, page 109, and the consolidated mortgage of December 2, 1889, Exhibit L to the amended bill, page 130, and all other mortgages or bond issues that may be claimed to have been executed and

issued by the said railroad company are all absolutely invalid, null and void, inoperative and ineffective as to, and not a lien upon, any of the property, rights or franchises of the said railroad company, as they were mandatorily prohibited by the said Act of July 2, 1864 and the Joint Resolution of May 31, 1870, as those acts only permitted one mortgage and bonds thereunder and the mortgage of July 1, 1870 provided for sufficient money to complete the railroad system but stated the number of miles to be built and the amount allowed per mile, (2500 miles at $50,000 per mile) and the said mortgages were not permitted or consented to by the Congress; at the time of the execution of the said six mortgages and other mortgages or bond issues the officials of the said railroad company then in charge and control, and some or all of whom were in 1893 and 1896 in charge of said railway company, claimed and pleaded in Barne vs. Northern Pacific Railroad, 56 How. Pr. Reps. 23 (N. Y.), Wheeler vs. N. P. R. R. Co.; Eby vs. N. P. R. R. Co.; Villard vs. N. P. R. R Co. (JCC, pages 1634, 3140, 1984, 4365, and 3501) and other cases, and represented to the public, to the Congress (hearings before the Joint Congressional Committee, part 1, page 280) and to the trustees and bondholders under the said last mentioned mortgages, as this defendant railroad company and these minority stockholders are informed and believe, that the so-called foreclosure of 1875 was a legal and valid foreclosure and that all the property, assets, rights and franchises and franchises to be [811] a corporation of this said

defendant railroad company under the Act of July 2, 1864 and acts amendatory thereof, passed out of this said defendant railroad company and into another organization, syndicate or corporation and was thus relieved from the burdens and prohibitions as to executing and issuing of mortgages and bonds under the said Act of July 2, 1864 and the Joint Resolution of May 31, 1870; that the trustees and bondholders under the said last mentioned mortgages were aware of and took the said mortgages and bonds with knowledge of the foregoing acts and of the invalidity and illegality of the said mortgages and bonds and were not purchasers for value without notice; the validity of these mortgages was not only determined or upheld in the so-called foreclosure proceedings of 1896, but in that consolidated cause entitled the Farmers Loan and Trust Co., et als. vs. Northern Pacific Railroad Co., et als., the question of ultra vires and invalidity of the said mortgage having been raised, the Court in an opinion of April 13, 1899 (Government's Exhibit 58, sub. 47) on the petition of Sidney H. Salomon, refused to pass upon the question by stating, "There are other matters determined by the special masters—such as the question of ultra vires and of the validity of the mortgage—which were not necessary, I think, to the decision of the question involved and upon which I express no opinion."

The Court had previously, on April 27, 1896, in the so-called decree ordering a sale of the properties of the railroad company, (which will hereinafter

be shown as beyond the jurisdiction of the Court, ultra vires and invalid and void) reserved without passing upon the ultra vires and invalidity of these mortgages and also reserved without passing on the question of the jurisdiction of the Court in that cause, for the Court in the decree stated:

> "XXIX. It is further adjudged, ordered and decreed that all questions not hereby disposed of, including the discharge of the receivers and the settlement of their accounts, are hereby reserved for further adjudication."

[812]

The decrees of April 27 and 28, 1896 directing sales and the decree of July 27, 1896 confirming sales in terms resrved and did not decide or dispose of the petition pending then before the Court of the Wisconsin Central Railroad Company, Government's Exhibit 58, sub. 23, which is referred to and made a part hereof, which specifically raised the jurisdiction of the Court and the validity of the said last mentioned six mortgages; (JCC Pt. 3 P. sales in terms reserved and did not decide or dispose 1408-9-11-32-33) that the said questions of the jurisdiction and dealing with the validity of the mortgages were never determined by the Court and all the proceedings and decrees as to the foreclosure were by consent and collusion between the officials in charge and control of the railroad company and who were then or shortly thereafter, became officials in control of the said railway company and the bondholders and trustees, and the said decrees amounted to no more than collusive agreements which the Court had no jurisdiction or authority to

confirm, all of which will be more fully set out hereinafter and much of which is set out in the Government's Exhibit 58, of which there are 53 subdivisions or parts, which are referred to and made a part hereof.

That all proceedings in 1875 and 1896 are null and void on the face of the record, as the United States Government was not a party to either suit, notwithstanding it had an interest in the land and held the legal title to much of the land and it was a necessary party and there was no jurisdiction unless the United States was a party. Ribon v. Railroad Companies, 16 Wall. 446; 21 L. ed. 367, which held that there was no jurisdiction when a necessary party was not made a party.

The United States had and has an interest in the land and grants and the deeds and mortgage were required to be recorded in the Interior Department under the control of the United States and not in the various counties of the various states.

In the Land Grant Acts of July 1, 1898 (30 Stats. 597, 619, 620, 621) Congress carefully refrained from recognizing the railway [813] company as the lawful successor of the railroad company and expressly stipulated that the question be left open for future determination. (For statute see hearings JCC, part 1, pages 89-90)

LVII

The so-called corporation now claiming and contending to be the Northern Pacific Railway Com-

pany was incorporated as the Superior and St. Croix Railroad Company under a special act of the legislature of the State of Wisconsin approved on the 15th day of March, 1870 (hearings before the Joint Congressional Committee part 5, page 3019), which provided for and named 11 persons as incorporators, and the laws of Wisconsin as to corporations created and chartered under special acts, as well as corporations created and chartered under private acts, required a majority of the incorporators to be present at the organization meeting of the incorporators to make it a legal meeting, and the laws of Wisconsin as to corporations under special charters and under the general act required a majority of the stockholders to be present at all meetings to make them legal meetings; that six of the incorporators of the said Superior and St. Croix Railroad Company failed to attend and did not attend the first meeting held on February 4, 1871 or any of the meetings of the incorporators and stockholders and never more than 5 of the 11 incorporators ever met in any meeting of the incorporators; the said Superior and St. Croix Railroad Company was never legally organized and never functioned or operated as a legal corporation, all of which appears from the hearings of the Joint Congressional Committee in 14 parts and to some extent in part 6, pages 3511 to 3547 inclusive, but many statements therein are inaccurate and incorrect. There were some so-called meetings of the said directors and stockholders, all of which were illegal and unlawful but the meeting

held on August 31, 1880 was the last meeting held until October 8, 1895 to approve the act of Hiram Hayes, secretary, in [814] applying for and procuring the amendment of the charter, which was approved April 15, 1895, being Chapter 244 of the Private and Local Laws of 1895 (hearings of the Joint Congressional Committee, part 5, page 3026). This amendment of 1895 increased the powers and rights of the company beyond and above what was originally granted and in violation of the constitution of the State of Wisconsin; Section 9 of the charter of 1870 provided "and no business shall be transacted at any meeting of the stockholders unless a majority of the stock subscribed is represented." The amendment of 1895 changed it to read, "and no business shall be transacted at any meeting of the stockholders unless a majority of the stock subscribed and outstanding is represented."

This 1895 Amendment was such an increase of the powers, rights and functions that were forbidden by the constitution and denounced by the Supreme Court of Wisconsin in the case of Black River Improvement Company vs. Railway, 87 Wis. 584; 58 N. W. 126.

LVIII.

At a meeting of the stockholders of the Superior and St. Croix Railroad Company held July 1, 1896 a resolution was passed as follows:

> "Resolved, that the corporate name of this corporation be, and the same is hereby, changed from 'The Superior and St. Croix Railroad

Company' to 'Northern Pacific Railway Company' which latter name is hereby adopted as the corporate name of this corporation."

The entire minutes of this meeting are Plaintiff's Exhibit 1, which is hereby referred to and made a part hereof.

LIX.

After the above amendment of the legislature of April 15, 1895, the question arising as to whether or not the corporation was not dead and abandoned for non user and the amendment for that reason was invalid, the Superior and St. Croix Railroad Company had the Attorney General of Wisconsin file a friendly petition for a writ of quo warranto to see whether or not the [815] charter had been lost by abandonment, non user and failure to have meetings and whether or not it could be amended by a special act, as the constitution had been changed forbidding the incorporation of companies by special act. The petition was heard and decided by the Supreme Court in the case of Mylrea, Attorney General, vs. Superior and St. Croix Railroad Company, 93 Wis. 604; 67 N. W. 1138, in which the Court held on June 19, 1896 that the charter had not been abandoned by a failure to hold meetings or to carry on any work. The Court specifically refused to pass on the question of whether or not the amendment was not ultra vires and invalid and implications from its language are that the Court thought that the amendment of 1895 was invalid

and ultra vires because of the increased or added rights, powers and franchises, for the Court stated:

> "As to the increased or added rights, powers, and franchises under Chapter 244 (1895), the information does not allege that the defendant has used or exercised any of them. There is nothing to show that the company has done any act that it might not lawfully have done under its original charter. The information is the foundation of the jurisdiction of the court, and it cannot be aided by the very general and uncertain statement filed by the defendant that it 'is exercising and intends to exercise, the privileges, rights and franchises conferred upon it * * * by the amendatory act of 1895, and to acquire, by purchase, construction and otherwise, the railroads and general routes designated in that act, and to operate the same within and without the state, and to issue its stock and bonds thereon, as authorized by said act.' An information in the nature of quo warranto cannot be maintained against a corporation from what it may intend or threaten to do. This information does not present any actual practical question in these respects for the judgment of the court, and no judgment of exclusion could possibly be framed upon such allegations. For these reasons, the court cannot consider them, or enter upon the question of the validity of the act of 1895, referred to. The motion for leave to file an information and for process is denied."

At a meeting of the Board of Directors of the Superior and St. Croix Railroad held in New York July 8, 1896 the following resolutions were unanimously adopted:

> "Resolved, that the corporate name of this corporation be, and the same is hereby, changed from 'The Superior and St. Croix Railroad Company' to 'Northern Pacific Railway Company' which latter name is hereby adopted as the corporate name of this corporation."
>
> "Resolved, that the secretary of the corporation be and he is hereby instructed to file in the office of the Secretary of State of Wisconsin a copy of the foregoing resolution and of the [816] record of its adoption certified under his hand and the corporate seal of the corporation, and to publish a certified copy of said resolution for three successive weeks in the Wisconsin State Journal, the official state paper, as provided by Section 1835 of the Revised Statutes of Wisconsin for 1878."

The original charter of March 15, 1870 provided in Section 15 as follows:

> "Section 15. The capital stock of the company hereby created shall, in the first instance, be five millions of dollars, which capital stock may be increased to any sum not exceeding ten millions of dollars; the said capital stock to be divided into shares of $100.00 each."

This act of March 15, 1870 and the acts of January 20 1871, March 16, 1871 and April 15, 1895, being the charter and amendments of the Superior and St. Croix Railroad Company, are hereby referred to and each and every one of said acts is made a part hereof as if textually incorporated herein. (The acts are in part 5, pages 3019 to 3031 of the hearings of the Joint Congressional Committee.) The amendatory act of April 15, 1895 repealed the above section 15 fixing the capital and by its section 10 it amended section 11 of the original charter of 1870 as to the increase of its capital stock as follows:

"Sec. 10. Section 11 of said chapter 326 is hereby amended so as to read as follows:

"Sec. 11. The capital stock of said company may be increased from time to time to such an amount as may by its stockholders be deemed necessary for the construction, acquisition, or operation of any of its railroad or railroads, by a vote of the owners of record of at least a majority of all its outstanding stock, in person or by proxy, at any annual meeting, or at any meeting called for that purpose, by a notice in writing to each stockholder, to be served upon him personally, or by depositing the same in the post office postage paid, properly directed to him at the post office nearest his usual place of residence, at least 20 days prior to such meeting. Such notice shall state the time and place of such meeting, its object and the amount to

which it is proposed to increase such capital stock. No vote in favor of such increase shall take effect until the proceedings of such meeting, showing the names of the stockholders voting therefor, and the amount of stock owned by each, shall be entered upon the records of said corporation, and the said company may at any such time, by a vote of the holders of record of two-thirds of said outstanding stock, classify its said stock into common and preferred; and it may further classify its said stock by dividing its preferred into different classes and it may make any or all of said classes of preferred stock cumulative or noncumulative as to dividends thereon, and any or all of said preferred stock may be with or without preference over any other stock or classes of stock in the event of the liquidation of the company's affairs, either through insolvency or otherwise. And the said company may make such preferred stock convertible into common stock upon such terms and conditions as may be fixed by the board of directors. [817]

The amended act added Sections 14, 15 and 16 as follows:

"Sec. 14. The said company shall, in addition to the special powers, conferred upon it by said chapter 326, and by this act, have, possess, and enjoy all of the rights, powers, privileges, and immunities conferred upon railroad corpo-

rations by chapter 87, of the Revised Statutes of 1878, and the acts amendatory thereof and supplementary thereto, and shall be subject, save where inconsistent herewith, to the restrictions, duties and liabilities imposed upon railroad corporations by said chapter, and all amendatory and supplementary acts.

"Sec. 15. Sections 13, 14, 15 16, 17, 18 and 19 of said chapter 326 are hereby repealed.

"Sec. 16. All acts and parts of acts inconsistent with, or in any manner contravening, the provisions of this act are hereby repealed."

These amendments granted, as the Court in the Mylrea case stated, "The increased or added rights, powers and franchises," which are unconstitutional, invalid and void; such increase or added powers cannot be granted as an amendment to a charter by special act of the legislature, as determined by the Supreme Court of Wisconsin in Black River Improvement Company vs. Halway, 87 Wis. 584; 59 N. W. 126, which held that the constitution of 1871 limited the power to amend to extend the life of the corporation but there could not be an amendment which increased the rights and powers of the corporation.

The capital stock of the company was increased to $155,000,000 at the meeting of the stockholders held July 1, 1896 in an attorney's office in Madison, Wisconsin (see minutes, Plaintiff's Exhibit 1), which was absolutely ultra vires, null and void as

it was not authorized by the original charter and it could not, under the constitution, be authorized by an amendment, and it was not in compliance with the amended section, even if the amended statute were valid, which is denied.

So-called directors meetings of the defendant railway company were held in various offices of various parties and hotels in various towns in the States of Washington, New York, Wisconsin and Minnesota as shown by Plaintiff's Exhibits 3 to 17, both inclusive, 20 to 22 both inclusive, 24 to 27, both inclusive, all of which are referred to and [818] made a part hereof, all of which meetings and all other meetings of stockholders and directors of the said railway company were unlawful, illegal, null and void and of no effect as shown by various exhibits and allegations of this answer and cross bill.

At the so-called meeting of the stockholders July 1, 1896 (Government's Exhibit 1) there were only 43 shares of the stock present at the meeting and they were all voted by the said John C. Spooner, A. L. Sanborn, (who was a law partner of Spooner and an attorney for the railroad company and receiver of the railroad company) and H. C. Reed under proxies. The 3800 shares of the outstanding stock at that time owned by the defendant railroad company and in the possession of its attorney, the said John C. Spooner, was not voted. The record does not show that it was present and there was no notice to the railroad company or its receiver.

The said minutes of said meeting (Government's Exhibit 1) show that the whole meeting was illegal, unlawful, null and void and contrary to and in violation of the original charter and, if the amended charter was valid, it was contrary to and in violation of said amended charter. [819]

The original charter of March 15, 1870 only authorized the building of a railroad from a point on the west shore of the Bay of Superior or the south shore of the Bay of St. Louis in Douglas County, Wisconsin, through several other counties, to a certain point on the Minensota boundary north of the Nemadji River as might be deemed advisable, which was purely an intrastate road. The so-called amendment of April 15, 1895 authorized the building of a road not only as set out in the original charter but to build it to points in Michigan and on to the Pacific Coast and to St. Paul, Minnesota and Chicago, Illinois, thus making it an inter-state railroad.

This was such an increase of the powers, rights and functions as were forbidden by the constitution and denounced by the Supreme Court of Wisconsin in the case of Black River Improvement Company vs. Halway, 87 Wis. 584; 59 N. W. 126.

LX

At the time of the meeting of the stockholders of said railway company on August 31, 1880, at which directors were elected, this defendant railroad company was the owner of and there was outstanding

in its name 3800 shares of the 3844 shares of outstanding stock of the said railway company, and at the meeting of August 31, 1880 the 3800 shares were voted and 12 other shares were voted, the other 32 not being voted.

At the meeting of July 1, 1896 the 3800 shares of the stock of the railway company belonging to the railroad company were in the custody and possession of John C. Spooner, who took part in said meeting, who was attorney for the said railroad company and for the receiver of the said railroad company and who had received the stock as such attorney from the First National Bank of Madison, Wisconsin on May 23, 1895, for and on behalf of the said railroad company, being certificates Nos. 20, 21, 22, 23, 24 and 25 for 500 shares each and No. 26 for 800 shares, which said certificates of stock were issued by the [820] Superior and St. Croix Railroad Company on July 29, 1873 to the Northern Pacific Railroad Company. The remaining 44 shares of stock of the Superior and St. Croix Railroad Company, which was afterwards changed to the Northern Pacific Railway Company, was bought up by officers and officials of the railroad company with its funds and for its benefit and at the said so-called stockholders meeting of the railway company of July 1, 1896 the railroad company was the owner of all of the stock of the said railway company, and at such meeting officers and officials of the railroad company were elected officers and officials of the railway company.

The foregoing action of the officials of the railroad and railway companies in voting the stock of the railway company, which was owned by the railroad company, was illegal, unlawful and condemned by the principles decided in the case of Wardell vs. Union Pacific Railroad, 103 U. S. 651; 26 L. ed. 509.

LXI

The decisions of the three Federal Courts in the Boyd case (hearings before JCC, part 6, page 3182, 3205 and 3220) being Boyd vs. Northern Pacific Railway Co., 170 Fed. 799 (C. C.), Northern Pacific Railway Company vs. Boyd, 177 Fed. 804 (C. C. A.) and Northern Pacific Railway Company vs. Boyd, 228 U. S. 482, stated and set forth most of the facts and proceedings in the so-called 1896 reorganization or so-called foreclosure proceedings of the railroad company and those cases held that the foreclosure suit was a collusive and fraudulent consent decree and that the decision in Paton vs. Northern Pacific Railroad Company, 85 Fed. 838 (C. C.) was not res judicata and was not a controlling authority because of the principles declared in C. R. I. & P. R. R. Co. vs. Howard, 7 Wall. 391; Louisville Trust Co. vs. Louisville R. R., 174 U. S. 674. While the Supreme Court stated that all the facts in the Paton case were not before the Court, yet it decided as it did; [821] the Court could have stated that the Circuit Court in the Paton case refused to take jurisdiction of the bill because it sought to have the Court make a new reorganization contract, and

further because Paton, as a creditor, was seeking to be put in the position to take the place of stockholders and yet did not offer to refund to the stockholders the $10.00 per share that they had deposited on their stock. The opinions in the three Boyd cases are referred to and made a part hereof.

The 1896 foreclosure was started by stockholders filing a creditors' bill on August 16, 1893 and the Farmers Loan and Trust Company filing a foreclosure bill on October 18, 1893, and there were other suits filed, all of which were afterwards consolidated and became known as the foreclosure proceedings of 1896, most of the proceedings in which are set forth in the Government's Exhibit 58, being in some 53 parts, and the final decree of which is Defendant's Exhibit 46. As hereinelsewhere alleged, the United States Circuit Court for the Eastern District of Wisconsin did not have jurisdiction of the parties or of the subject matter or of the property of some of the mortgages or of the United States, and the decrees and proceedings therein are absolutely null and void, ultra vires and beyond the power and jurisdiction of the Court, and when such powers and jurisdictions were raised in the suit, the Court refrained from deciding same and they have never to this day been decided in that suit, or elsewhere.

The so-called decrees of foreclosure and sale in the said consolidated suit were contrary to, in violation of, and prohibited by the Act of July 1, 1864 and the Joint Resolution of May 31, 1870 and acts amendatory thereof, and the said decrees are abso-

lutely null and void and beyond the jurisdiction and power of the Court and the same appears on the face of the record. The decisions in the Boyd case state that there was no actual foreclosure sale.

[822]

On October 15, 1896 the Northern Pacific Railroad Company executed a deed to the so-called Northern Pacific Railway Company conveying all its land grants, properties and assets, in which deed it is stated that the decrees of April 27, 1896 and April 28, 1896 ordered "that unless the defendant Northern Pacific Railroad Company should make all the payments directed in Article 20 of said decree within the time limited, all the lands granted by Congress to aid in the construction equipment of the said railroad of the said defendant Northern Pacific Railroad Company, and all rights of said Northern Pacific Railroad Company under the said land grants made to it by Congress, except such lands as lie within the State of Minnesota and the State of North Dakota east of the Missouri River," should be sold.

Then, after reciting the sales and confirmation thereof on August 18, 1896, the deed recites:

> "Whereas in and by the said decrees of confirmation it was further ordered by way of further issuance and confirmation of title to the said purchases, the Northern Pacific Railroad Company, mortgagor, and the Farmers Loan and Trust Company, mortgagee, each by its proper officers and under its corporate seal,

should upon the request of such purchaser, Northern Pacific Railway Company, sign, seal, execute, acknowledge and deliver to such purchaser, or to its successors or assigns, all proper deeds of conveyance, transfer, release, further assurance of all the railroad property and franchises so, as aforesaid, sold under the decree of such court, and embraced in the deed of the special Masters, so as fully and completely to transfer to, and invest in, the said purchaser, and in its successors and assigns, the full legal and equitable title to all such railroad property and franchises sold and intended to be sold as aforesaid, and

"Whereas the board of directors of the Northern Pacific Railroad Company, party of the first part hereto, had duly resolved and directed that the deed be made, executed and delivered by the said corporation to the said Northern Pacific Railway Company

"Now, therefore, this indenture witnesseth, that the said party of the first part hereunto, pursuant to the authority and direction to it in said judgment and decree contained as hereinbefore recited, and also in pursuance of the resolution of the board of directors as aforesaid * * *"

This deed was acknowledged in New York in ten original copies on the same date, October 15, 1896; this deed and the decree recited therein are absolutely null and void and beyond the jurisdiction and

power of the Court to require or order and there was no pleading in [823] the cause to justify same or on which same could be based; the said deed is absolutely null and void as a deed and act of the said railroad company and was in violation of and prohibited by the Act of July 2, 1864 and the Joint Resolution of May 31, 1870 and acts amendatory thereof. as held by the Supreme Court in Northern Pacific Railway Company vs. Townsend, 190 U. S. 267. This deed is set out in full in hearings before the Joint Congressional Committee, part 1, pages 623 through 635. [824]

LXII

By a so-called decree of September 16, 1899 in the said consolidated foreclosure proceedings of 1896, it was provided in part as follows:

> "It is further ordered and decreed that by way of further assurance and confirmation of title to such purchaser, the said Northern Pacific Railroad Company, by its proper officers and under its corporate seal, shall sign, seal, execute, acknowledge and deliver to said purchaser or its successors or assigns, its deed or deeds of conveyance, assignment, transfer, release and further assurance of all the said lands and rights sold to said purchaser." (hearings before JCC, part 3, page 1480.)

This decree and the above portion thereof were beyond the power and jurisdiction of the Court, and furthermore, there was no allegation in any of the

pleadings in the cause on which to base such an order, and the decree and the above portion thereof and the deed executed by the railroad company thereunder to the railway company are both illegal, null and void, as prohibited by the act of July 2, 1864 and the Joint Resolution of May 31, 1870 and acts amendatory thereof, as held by the Supreme Court in Northern Pacific Railway Company vs. Townsend, 190 U. S. 267; 47 L. ed. 1044, in which the railway company herein was the same railway company therein and was under the above statutes. The parties to the said foreclosure proceedings of 1896 had, during the three years prior to this decree of September 16, 1899, come to a realization that the Court proceedings and other transactions were all illegal, null and void and that then, in a desperate effort to try to make the transaction carry water, they had the above invalid and void decree entered and the invalid and void deed executed—the said railroad company being then in captivity to the said railway company, as its officers and officials had forsaken the railroad company and in violation of their duties permitted the said decree and deed to be entered and executed. A deed from the railroad company to the so-called railway company was executed October 15. 1896 (JCC, Pt. 1, p. 624) reciting it was authorized by decree of April 27 (see XXVI) and 28 (see IV, JCC. 1409-11) 1896 and confirmation of sales decree of August 8, 1896 required such a deed (JCC. 1441) all of which was illegal and beyond the jurisdiction of the Court.

[825]

LXIII

It was never the intention of the officials of the Northern Pacific Railroad Company and of the so-called Northern Pacific Railway Company to make a bona fide sale of the land, property and franchises of the railroad company in the 1896 reorganization and foreclosure, as the reorganization agreement of March 16, 1896 set out at page 2846 of the hearings before the JCC, (Plaintiff's Exhibit M to the amended bill, printed exhibits Volume 1, page 163) to which reference is made and it is made a part hereof, provided at page 2847 that the old agreement of February 19, 1894, printed exhibits Volume 1, page 166) was adopted into and made a part of the agreement of March 16, 1896 and it provided among other things, page 2849, that the reorganization managers could

> "do whatever, in the judgment of the managers, may be necessary to promote or to procure the sale as an entirety or the joint or separate sales of any lands, grants of lands, property, or franchise herein concerned, wherever situated; to adjourn any sale of any property or franchise, or of any portion or lot thereof at discretion; to bid or to refrain from bidding at any sale, either public or private, either in separate lots or as a whole, for any property or franchises or any part thereof, whether or not owned, controlled or covered by any deposited security or by the bonds represented by any assenting certificate, including or excluding any particular

rolling stock or other property, real or personal, and at, before, or after any sale to arrange and agree for the resale of any portion of the property which they may decide to sell rather than to retain; to hold any property or franchises purchased by them, either in their name or in the name of persons or corporations by them chosen for the purposes of this agreement, and to apply any security embraced hereunder in satisfaction of any bid or toward obtaining funds for the satisfaction thereof; and the term property and franchise shall include any and all railroads, railroad and other transportation lines, branches, leaseholds, lands, rights in lands, mining rights, stocks, or other interests in corporations, in which the railroad company has any interest of any kind whatever, direct or indirect. The amount to be bid or paid by the managers for any property or franchises shall be absolutely discretionary with them; and in case of the sale to others of any property or franchises the managers may receive out of the proceeds of such sale or otherwise any dividend in any form accruing on any securities held by them."

At the invalid so-called meeting of the stockholders of the railway company on July 1, 1896, upon the motion of John C. Spooner it was stated that

[826]

"Whereas under the reorganization plan of March 16, 1896, Morgan & Co. hold securities

of the Northern Pacific Railroad, which they propose to use in the purchase of the railroad, franchises, and property at the sales under the foreclosure decrees or upon the request of the Northern Pacific Railway Co. in exchange for its capital stock and bonds to transfer the Northern Pacific Railroad securities to the Northern Pacific Railway Co. to enable the Northern Pacific Railway Co. to purchase at the foreclosure sale the rights, property and franchises of the Northern Pacific Railroad Co., it was resolved that the Northern Pacific Railway Co. to enter into contracts with J. P. Morgan & Co. reorganization manager, for the securities of the Northern Pacific Railroad and use these securities to purchase the railroad property and franchises of the Northern Pacific Railroad Co., and that the president and secretary of the company were authorized to attend the judicial sales and bid in the Northern Pacific Railroad property to the extent of the securities of the railroad company then controlled by the railway company, and in payment therefor to transfer and deliver any or all of the stocks, bonds, or other securities of the Northern Pacific Railroad Co."

The above contract and proceedings and the contract of July 13, 1896 (Plaintiff's Exhibit N, printed volume 1, page 189) between the railway company and Morgan and Co., in which it was stated that the railway company intended to acquire

the railroad company property and franchises, including the grant of the Northern Pacific Railroad Company under the said foreclosure decree, were prior to the mock foreclosure sale.

LXIV

That the so-called requirement of the said so-called railway company, which it is hereinbefore alleged is not a corporation, that these and other minority stockholders of the said railroad company turn in their stock and pay $10.00 per share and in return therefor receive stock of the said so-called railway company and these and other preferred stockholders of the said railroad company turn in their stock and pay $15.00 per share therefor, was without any consideration, and was illegal, unlawful, invalid and void and part of the scheme to defraud these minority stockholders and others similarly situated. That there was no power in the said so-called railway company or the Court or the said railroad company to force these minority stockholders and others similarly situated to make such deposit and to take stock of the said so-called railway company, and it was not [827] the intention of the parties to the various so-called reorganization agreements of 1894 and 1896 to forfeit the rights of those minority stockholders and others similarly situated in their stock in the said railroad company or their share of the assets and properties of the said railroad company or to the preferred stockholders' rights to have their preferred stock paid out of the sales

of certain land, nor was it the intention of the said parties to the said reorganization agreements to enforce the so-called time limit and the said so-called time limit was not enforced but was waived and long after the expiration of the said so-called time limit the parties to the said agreement sought to persuade the minority stockholders to come into the agreement and put their stock in; that the officers and officials, which terms include the directors. of the so-called railway company, as herein elsewhere described and alleged, unlawfully and illegally seized and took possession of all of the property, assets, franchises and rights of the said railroad company in 1896 and have held them ever since.

That these minority stockholders and others similarly situated are entitled to their pro rata interest in all the properties, lands, land grants, leases, notes, bonds, stock, monies and all other assets of the Northern Pacific Railroad Company owned and possessed by the Northern Pacific Railroad Company in 1875 and in 1896 and all of same which have been seized, grabbed, collected. taken possession of and held by the said so-called railway company from 1896 to this date, whether or not held by the said so-called railway company in its own name or whether put into the names of other corporations and individuals for its benefit, the stock and notes of such corporations and individuals being held and retained by the said so-called railway company; that copies of the common stock certificates and preferred stock certificates similar to those held

by these minority stockholders were filled in this cause as Government Exhibits 29 and 30, to which reference is made and same are made a part hereof.

[828]

LXV

That on numerous occasions and at practically every annual meeting since 1899 of the said railroad company, these minority stockholders and others similarly situated and cooperating with them have made efforts to have the said railroad company take steps to protect the said railroad company and its stockholders and recover back from the said railway company, its successors, assignees and subsidiaries, all of the property, lands, land grants, leases, stocks, bonds, notes, monies and assets belonging to it which were seized and taken possession of and held by the said so-called railway company, its successors, assignees and subsidiaries; there are in the record as exhibits minutes of many meetings of the said railroad company which are referred to and made a part hereof, and which show efforts of such minority stockholders to have righted and corrected and to overcome the above described actions and proceedings had and taken by the said officials of the said so-called railway company who are officials of and have seized and taken possession of and held the said railroad company in captivity and thwarted and prevented all such efforts of minority stockholders to obtain such relief, which acts on the part of the said officials and officers of the said railroad company are illegal and unlawful.

LXVI

That in this cause the said officials and officers of the said so-called railway company illegally and unlawfully had the attorneys for the said so-called railway company, namely, Grafton Mason, E. J. Cannon, D. F. Lyons and D. R. Frost, who filed pleadings for the said so-called railway company, to file certain so-called pleadings claiming to be on behalf of and as the pleadings of this said railroad company, being the Northern Pacific Railroad Company, and sign the same as solicitors for the Northern Pacific Railroad Company, one of which pleadings so filed in this cause on January 18, 1932, was entitled and is as follows: [829]

"DISCLAIMER OF NORTHERN PACIFIC RAILROAD COMPANY

Defendant Northern Pacific Railroad Company, a corporation, organized and existing under the provisions of the Act of July 2, 1864 (13 Stat. 365) says that it does not claim or pretend to have any right, title or interest in the subject matter of this suit as set forth in the original bill of complaint as amended, or any part thereof, and this defendant disclaims any right, title or interest in said subject matter and every part thereof.

Wherefore this defendant prays that the original bill of complaint as amended be dismissed as to it."

The other such pleading was filed May 9, 1932 and was entitled and is as follows:

> "ANSWER OF DEFENDANT NORTHERN PACIFIC RAILROAD COMPANY, A CORPORATION
>
> Now comes the defendant Northern Pacific Railroad Company, a corporation, and for its answer to the bill of complaint says:
>
> It admits that it is a federal corporation, organized and existing under the provisions of the Act of July 2, 1864 (13 Stat. 365), and has an office in the City of New York. Denies that it is engaged in business.
>
> Defendant abides by, adopts and makes a part of this answer the amended and supplemental answer filed herein by defendant Northern Pacific Railway Company."

The filing of the said two above Court pleadings by the said so-called railway company through its own solicitors claiming to be on behalf of the said railroad company was part of the illegal and unlawful schemes and plans of the said so-called railway company to maintain its captivity and seizure of the said railroad company in fraud of the minority stockholders of the said railroad company and especially of the minority stockholders herein and those cooperating with them, and the said pleadings are of no effect and are absolutely null and void, and without any authority of the directors or stockholders of said railroad company.

LXVII.

That all of the stock, notes and bonds of the Northwestern Improvement Company held by the said railway company or its successors, assigns or subsidiaries and all lands under the grants of the Act of July 2, 1864 and the Joint Resolution of May 31, 1870 taken in the name of the said Northwestern Improvement Company and all the notes, stocks or bonds of other corporations or [830] individuals which are assignees, successors or subsidiaries of the said railway company and all lands under the land grants of the Act of July 2, 1864 and the Joint Resolution of May 31, 1870 received and taken in the name of the so-called railway company or any of such assignees, successors or subsidiaries are the lands and properties and belong to and the title actually is in or should be in the name of this said defendant Northern Pacific Railroad Company. Whatever title or possession is held otherwise is illegal and unlawful and is for the use and benefit of the said Northern Pacific Railroad Company.

Wherefore, this defendant Northern Pacific Railroad Company and these minority stockholders on behalf of said Northern Pacific Railroad Company and themselves and all others similarly situated pray:

(a) That the Court find, declare, and decree that the grants made to this defendant Northern Pacific Railroad Company by the Act of July 2, 1864 and the Joint Resolution of May 31, 1870 were and are

deficient to the extent and at the times alleged in the answer and cross bill as well as in the answer of the so-called Northern Pacific Railway Company and that the Court determine the compensation due to this defendant, the Northern Pacific Railroad Company for the lands expropriated by the United States by the Act of June 25, 1929 and enter its decree in favor of this defendant Northern Pacific Railroad Company for the sums so found together with interest thereon from the 25th day of June, 1929 and that nothing be found due to the said so-called Northern Pacific Railway Company.

(b) That the Court find, declare and decree that title to all lands granted, grantable, patented, and patentable, under the Act of July 2, 1864 and the Joint Resolution of May 31, 1870 is vested by virtue of said acts in this defendant Northern Pacific Railroad Company and in no other company, corporation, association [831] or individual and that no part or portion of same has passed to any other company, corporation, association or individual except the sales by this defendant railroad company to homestead exemptors.

(c) That the Court find, declare and decree that any so-called title, deed, patent or claim in and to any of such lands described in the preceding prayer as may have passed to the said Northern Pacific Railway Company or any other company, corporation, association or individual except homestead exemptors be declared to have so passed illegally and unlawfully and in violation of the statute and

that any deeds, conveyances or patents to such extent be cancelled and declared null and void and title to same be found, declared and decreed to be in said railroad company.

(d) That the Court find, declare and decree that any and all patents issued by the United States for lands granted and patentable under the Act of July 2, 1864 and the Joint Resolution of May 31, 1870 to any company, corporation, association or individual other than this defendant Northern Pacific Railroad Company be declared illegal and unlawful, null and void and be cancelled and that the United States be required to issue a new patent covering and including all of such lands to this defendant Northern Pacific Railroad Company.

(e) That this Court find, declare and decree that no title right of possession or ownership passed out of this defendant Northern Pacific Railroad Company by the so-called foreclosure proceedings and the reorganization proceedings of 1875.

(f) That the Court find, declare and decree that no title, right of possession or ownership to any of the lands granted, grantable and patentable under the Act of July 2, 1864 and the Joint Resolution of May 31, 1870 whether or not theretofore or thereafter patented or still patentable, passed out of this said defendant Northern Pacific Railroad Company by the so-called foreclosure proceedings and reorganization of 1896, and further [832] that the Court find, declare and decree that title to all such lands was and is in the said Northern Pacific Railroad

Company and that it is entitled to possession thereof, and possession thereof be decreed to said Northern Pacific Railroad Company.

(g) That the Court find, declare and decree that title and ownership and right to possession of any and all of the lands, buildings, property, leases, stock, bonds, notes and monies held and owned by the said Northern Pacific Railroad Company and to which it was entitled in 1875 and 1896 did not pass out of and has not passed out of the said Northern Pacific Railroad Company by and on account of the foreclosure proceedings and reorganization of 1875 and foreclosure proceedings and reorganization of 1896 or any other proceedings or contracts, and be it further found, declared and decreed that the said Northern Pacific Railroad Company has title to and ownership of and is entitled to possession of and that possession be decreed and ordered given to the said Northern Pacific Railroad Company of all of such lands, buildings, property, leases, stock, bonds, notes and monies and of all such lands, buildings, properties, leases, stock, bonds, notes and monies which have passed to, been received, seized, grabbed, or taken possession of, by the said Northern Pacific Railway Company or any or all of its successors, assignees or subsidiaries and that such mandatory orders and injunctions be granted and issued as may be necessary to enforce such return of the possession and custody of same to the said Northern Pacific Railroad Company.

(h) That the Court find, declare and decree that the $125,000,000 of bonds secured by and issued under the mortgage of July 1, 1870, which were retired into the treasury as a trust fund and for the benefit and protection of the preferred stockholders and thereafter the common stockholders who took such stock for debts owing by the Northern Pacific Railroad Company, are now, [833] and have at all times since their transfer into the said treasury, been treasury bonds subject to the aforesaid rights of the preferred and common stockholders still unsatisfied and unpaid and the first and only lien on the lands, franchises, rights and properties described in the said mortgage of July 1, 1870.

(i) That the Court find, declare and decree that, with the exception of the mortgage of July 1, 1870, all mortgages, deeds of trust or other liens, as well as any bonds, notes or obligations secured thereby, executed by the said Northern Pacific Railroad Company on the property described in same, being the said Northern Pacific Railroad System described in the bill, to be absolutely null and void, of no effect and not a lien on any property described therein or on any property of the said Northern Pacific Railroad Company.

(j) That the Court find, declare and decree that all mortgages, trusts, or liens and the bonds, notes or obligations secured thereby issued by the so-called Northern Pacific Railway Company since June 30, 1896 not to be a lien on or to in any way encumber or affect any of the property of the said

Northern Pacific Railroad Company, which same purported to cover and include and purported to be the property of the Northern Pacific Railway Company, and further not to be any obligation whatever of the said Northern Pacific Railroad Company.

(k) That the Court find, declare and decree that the said Northern Pacific Railroad Company be released from the captivity thereof by the said railway company, as alleged in the answer and cross bill, and that a stockholders meeting of the said Northern Pacific Railroad Company be ordered to be held for the election of officers and directors, and that at such meeting no officer, director or stockholder of the said so-called Northern Pacific [834] Railway Company shall be elected an official or director of the said Northern Pacific Railroad Company; and further that the said Northern Pacific Railroad Company and its stockholders be restored to all their rights and privileges, free from any dominance of the said so-called railway company.

(l) That the plaintiff and all other defendants in this cause be required to answer this cross bill of the Northern Pacific Railroad Company but not under oath, as answer under oath is expressly waived.

(m) That the Court find, declare and decree all other further and general relief to the said Northern Pacific Railroad Company as its cause may require and to equity may seem just and proper, in-

cluding counsel fees and costs. And it will ever pray.

NORTHERN PACIFIC RAILROAD COMPANY,
By CHARLES E. SCHMIDT,
GEORGE LANDELL,
Executor of E. A. Landell.
CLARENCE LOBENTHAL,
Trustee of Bernard Lobenthal.
WALTER L. HAEHNLEN.

THOMAS BOYLAN,
Liberty Trust Building,
Philadelphia, Pennsylvania.
ROBERT L. EDMISTON,
Title Building,
Spokane, Washington.
RAYMOND M. HUDSON,
MINOR HUDSON,
GEOFFREY CREYKE, JR.,
Peoples Life Insurance Bldg.,
Washington, D. C.,
Solicitors for the Minority Stockholders on behalf of Northern Pacific Railroad Company. [835]

State of Pennsylvania,
County of Philadelphia—ss:

I, Walter L. Haehnlen, being first duly sworn, depose and state that I am one of the minority stockholders of the Northern Pacific Railroad Company who are filing the foregoing answer and cross bill

of the Northern Pacific Railroad Company on its behalf, and I have read the said answer and cross bill and the facts stated therein are true to the best of my knowledge, information and belief.

WALTER L. HAEHNLEN.

Subscribed and sworn to before me and given under my hand and seal this 30th day of August, 1937. My commission expires the 7th day of March, 1939.

(Notarial Seal) ANNA B. RENSHAW,
Notary Public for County of Philadelphia,
State of Pennsylvania.

One copy rec'd this 3rd day of Sept. 1937.

J. M. SIMPSON,
U. S. Atty.
F. J. McKEVITT,
By J. L. THOMAS.

[Endorsed]: Filed Sept. 3, 1937. [836]

[Title of District Court and Cause.]

MOTION TO STRIKE ANSWER AND CROSS BILL

Comes now the plaintiff above named and moves the Court for an order striking from the records herein the Answer and Cross Bill of the Northern Pacific Railroad Company by Charles E. Schmidt and other Minority Stockholders of said Railroad Company on the ground that no leave of Court had

been asked or obtained for filing said Answer and Cross Bill under rule 21 of the rules of this Court;

The plaintiff further moves the Court for an order dismissing said Answer and Cross Bill of the Northern Pacific Railroad Company by Charles E. Schmidt and other Minority Stockholders of said Railroad Company on the ground that said Cross Bill does not state cause of action against the United States. [837]

This motion is based upon the records and files herein.

Dated this 13th day of September, 1937.

J. M. SIMPSON
United States Attorney for the
Eastern District of Washington
Of Attorneys for Plaintiff.

Copy received this 13th day of September, 1937.

ROBERT L. EDMISTON
Of Attorneys for the Minority
Stockholders on behalf of Northern Pacific Railroad Company
Of Attorneys for Defendants.

[Endorsed]: Filed Sept. 13, 1937. [838]

[Title of District Court and Cause.]

MOTION TO STRIKE ANSWER AND CROSS BILL OF THE NORTHERN PACIFIC RAILROAD COMPANY BY CHARLES E. SCHMIDT AND OTHER MINORITY STOCKHOLDERS OF SAID RAILROAD COMPANY.

The defendants Northern Pacific Railway Company, Northern Pacific Railroad Company, and Northwestern Improvement Company, move the Court for an Order striking the so-called answer and cross-bill of Northern Pacific Railroad Company by Charles E. Schmidt and other minority stockholders of said Railroad Company, filed and served in this cause on the 3rd day of September, 1937, on the following grounds:

I.

The Northern Pacific Railroad Company has long since filed its answer in this cause by D. F. Lyons and others who were duly authorized attorneys of the said Northern Pacific Railroad Company, and D. F. Lyons has been succeeded as attorney for said Railroad Company in this cause by L. B. [839] daPonte whose appearance has heretofore been duly entered therein. Said L. B. daPonte, D. R. Frost, and F. J. McKevitt, who succeeded E. J. Cannon, are and were at the time said pretended answer and cross-bill of said Railroad Company was filed, the duly authorized attorneys of record for said Railroad Company, pursuant to Rule 4 of this Court, and

said Charles E. Schmidt and others, said to be minority stockholders of the said Railroad Company, do not have the authority of said Railroad Company, or any authority whatsoever, to file any answer, cross-bill, or other pleading in this cause in behalf of said Railroad Company.

II.

Neither Thomas Boylan and others purporting to sign said answer and cross-bill as solicitors for the minority stockholders on behalf of said Northern Pacific Railroad Company, nor said individual stockholders have been substituted as attorneys for said Railroad Company as required by the last paragraph of Rule 4 of this Court; nor have said parties or any of them applied to this Court for leave to substitute said pretended answer and cross-bill for the answer heretofore filed on behalf of said Northern Pacific Railroad Company by its duly authorized attorneys.

III.

Insofar as the so-called answer and cross-bill filed by said Charles F. Schmidt and others claiming to be minority stockholders is in their own names and in their own behalf, said parties may appear in this cause only after complaint in intervention has been duly noticed and allowed under an order of this Court under Equity Rule 37. No notice of petition for leave to intervene has been filed, and no order permitting intervention has either been asked by said Schmidt and the others, or made by this Court.

[840]

IV.

Insofar as said document purports to present a cross-bill of said Northern Pacific Railroad Company or said Schmidt and others, the same has not been filed within the time fixed by Rule 21 of the Rules of Practice of Federal Court, Ninth Judicial District, which provides as follows:

> "A cross-bill may be filed after the taking of evidence has commenced on leave of Court on such terms and conditions as may be just."

The taking of evidence in this case has commenced and has been completed with respect to defendants' motions directed to the bill of complaint and with respect to the adjustment of the grant, and the Master has made his report, and this case is now ready for argument and will be set for argument in this Court on exceptions to the said Master's report on the adjustment of the grant, all of which appears from the record in this cause.

Insofar as, if at all, said so-called answer is to be taken as an answer on behalf of said Schmidt and others as minority stockholders, it comes too late to entitle said parties to intervene or to open up the evidence or otherwise take part in this cause.

V.

Insofar as said cross-bill presents issues between the Northern Pacific Railway Company and the Northern Pacific Railroad Company and said Schmidt and others, which are not germane, nor in

any way related to the subject matter of the complaint or to the issues to be determined in this cause between plaintiff and all of said defendants, said issues can not be asserted in this cause by said purported cross-bill.

Without waiving their motion to strike the so-called answer and cross-bill filed herein September 3, 1937, and in the event only that said motion be overruled, defendants move that said parties claiming to be minority stockholders, namely [841] Charles E. Schmidt, George Landell, Clarence Loebenthal, and Walter L. Haehnlen, not being residents of this district, but residents of the State *of* Pennsylvania, be required to give security for costs in accordance with Rule 76 of the rules of this court.

L. B. daPONTE,
D. R. FROST,
F. J. McKEVITT,
Solicitors for Defendants Northern Pacific Railway Company, Northern Pacific Railroad Company, and Northwestern Improvement Company.

Service acknowledged by a receipt of a true and correct copy this 15th day of Sept. 1937.

ROBERT L. EDMISTON,
Of Attorneys for N. P. Railroad.

[Endorsed]: Filed Sept. 15, 1937. [842]

[Title of District Court and Cause.]

MOTION FOR LEAVE TO FILE INTERVENING PETITION

Now come Walter L. Haehnlen and others and move the Court to grant them leave to file their intervening petition, the original of which is hereto attached, copies of same having been served on counsel for the various parties.

THOMAS BOYLAN
ROBERT L. EDMISTON
HUDSON & HUDSON
By RAYMOND M. HUDSON
Attorneys for Petitioners

Copy of Notice and Petition received Jan. 31/38.
SAM M. DRIVER
U. S. Attorney
By M. SNYDER

Service accepted Jan. 31, 1938.
F. J. McKEVITT
As Atty for three defts. last above named

NOTICE

To J. C. Biggs, Esq., E. E. Danley, Esq., Walter Pope, Esq., Sam M. Driver, Esq., Attorneys for the United States; L. B. daPonte, Esq., D. R. Frost, Esq., F. J. McKevitt, Esq., Attorneys for Defendants:

Take notice that the above motion and the petition attached thereto will be lodged with the Clerk

in due course of mail and will be presented to the Court on the day that the Court hears the motions of defendants and plaintiff to strike out the answer of the Northern Pacific Railroad Company filed by these petitioners.

HUDSON & HUDSON
By RAYMOND M. HUDSON
Attorneys for Petitioners [843]

[Title of District Court and Cause.]

PETITION OF CHARLES E. SCHMDIT AND OTHER STOCKHOLDERS OF THE NORTHERN PACIFIC RAILROAD COMPANY TO INTERVENE ON THEIR OWN BEHALF AND ON BEHALF OF ALL OTHER STOCKHOLDERS SIMILARLY SITUATED.

Now come Charles E. Schmidt, George Landell, executor of E. A. Landell, deceased, Clarence Loebenthal, trustee of Bernard Loebenthal, and Walter L. Haehnlen, holders and owners of common and preferred stock of the said Northern Pacific Railroad Company, on behalf of themselves and all others similarly situated, of whom the holders of approximately 32,559 shares of said stock are cooperating with these, being practically all of the stock of said railroad company except that which is in possession of the Northern Pacific Railway Company, whether cancelled or owned by said railway company these petitioners do not have sufficient

knowledge to allege, and present this petition to intervene on behalf of themselves and all other preferred and common stockholders of the said railroad company similarly situated who may come in and share in this suit, and allege as set out below.

First. The petitioners filing this petition to intervene are enumerated below. All of the said individual minority stockholders are over the age of 21 years, are residents of the State of Pennsylvania and own and hold common and/or preferred stock of said Northern Pacific Railroad Company as follows: [844]

(a) George Landell is the duly appointed and qualified executor of the Estate of the late E. A. Landell, and said E. A. Landell owned at the time of his death and there has come into the hands of the executor, which he now owns and holds, 200 shares of said common stock of said railroad company, being certificate No. A 42067 and A 42068 for 100 shares each, dated June 13, 1890.

(b) Clarence Loebenthal is the duly appointed and qualified trustee for Bernard Loebenthal, and owns and holds 1500 shares of the common stock of said railroad company, being certificates No. A 56090 to A 56104 inclusive, for 100 shares each, dated December 30, 1901.

(c) Charles E. Schmidt is the owner and holder of 200 shares of the preferred stock of the said railroad company, being certificates No. 54792 and 54793 for 100 shares each, dated July 31, 1893, which were issued in the name of J. P. Paulding

and Co. and duly assigned to Charles E. Schmidt.

(d) Walter L. Haehnlen is the owner and holder of 121 shares of preferred and 240 shares of common stock of the said railroad company, of which 65 shares of the common were derived from certificates No. A 55983 for 100 shares dated February 7, 1898 in the name of Brice, Monges and Company and duly assigned to Walter L. Haehnlen and certificate No. B 8738 for 15 shares dated August 14, 1883 in the name of Samuel Forsyth; of which 100 shares of the common were derived from certificates No. B 21743 for 20 shares dated August 14, 1893 in the name of DeHaven & Townsend and duly assigned to Walter L. Haehnlen, certificate No. B 22104 for 15 shares dated September 2, 1893 in the name of DeHaven & Townsend and duly assigned to Walter L. Haehnlen, certificate No. B 21923 for 55 shares dated August 22, 1893 in the name of DeHaven & Townsend and duly assigned to Walter L. Haehnlen, certificate No. C 12011 for 10 shares dated August 30, 1893 in the name of DeHaven & Townsend and duly assigned to Walter L. Haehnlen and certificate No. A 56134 for 100 shares [845] dated September 22, 1902 in the name of Joseph I. Keefe and duly assigned to Walter L. Haehnlen; of which 50 shares of common were derived from certificate No. A 49237 for 100 shares dated November 4, 1892 in the name of Patrick Cunningham and duly assigned to Walter L. Haehnlen; of which 15 shares of the preferred is the

original certificate No. 051461 issued in the name of Jacob Witmer, dated June 2, 1891 and duly assigned to Walter L. Haehnlen; of which 50 shares of preferred were derived from certificates No. 56503 and 56504 for 100 shares each in the name of Katharine M. Lewis, dated June 14, 1906, and No. 039271 for 12 shares, dated June 14, 1906 in the name of Katharine M. Lewis and duly assigned to Walter L. Haehnlen.

Second. This petition is on behalf of the Northern Pacific Railroad Company and the minority stockholders of the said Northern Pacific Railroad Company above mentioned and hereinafter described and all other common and preferred stockholders of the said railroad company who may join herein and share the costs of the suit to redress, restrain or avoid the effect of certain unlawful and wrongful acts, had, done and threatened which have resulted in and will result in damage and injuries to the said railroad company and the petitioners and all other holders of the common and preferred stock of the said railroad company hereinafter more particularly and in detail averred and to that end to vacate and set aside all unlawful acts and actions had and done and to declare the rights of all parties and to redress all wrongs and to enjoin and restrain all further and proposed unlawful acts and deeds. One of the principal bases of this petition is to restore to the said railroad company all its rights, privileges, franchises, properties, money and assets, free and clear of all encumbrances, interference or

management of and by the said Northern Pacific Railway Company, hereinafter called the railway company, and to release the said railroad company from the captivities which it has been put into and held under by the wrongful and unlawful acts of [846] the said railway company and the officers and officials of the said railway company and the said railroad company as hereinafter set out and to declare, decree and enforce all the rights of the said railroad company and of these minority stockholders and all others in a similar position and of all of the said defendants and of all other persons interested as provided and mandatorily required in the Act of Congress approved June 25, 1929, sections 5 and 6, amending the act of July 2, 1864, and the Joint Resolution of May 31, 1870 (46 Stat. 355), all questions of laches being eliminated by the wording of the Act, which provided in part as follows:

> "Sec. 5 * * * In the judicial proceedings contemplated by this Act there shall be presented, and the court or courts shall consider, make findings relating to, and determine to what extent the terms, conditions, and covenants expressed or implied, in said granting Acts have been performed by the United States, and by the Northern Pacific Railroad Company, or its successors, including the legal effect of the foreclosure of any and all mortgages which said Northern Pacific Railroad Company claims to have placed on said granted

lands by virtue of authority conferred in said resolution of May 31, 1870 and the extent to which said proceedings and foreclosures meet the requirements of said resolution with respect to the disposition of said granted lands, and relative to what lands, if any, have been wrongfully or erroneously patented or certified to said companies, or either of them, as the result of fraud, mistake of law, or fact or through legislative or administrative misapprehension as to the proper construction of said grants or Acts supplemental or relating thereto, or otherwise, and the United States and the Northern Pacific Railroad Company or the Northern Pacific Railway Company, or any other proper person, shall be entitled to have heard and determined by the court all questions of law and fact, and all other claims and matters which may be germane to a full and complete adjudication of the respective rights of the United States and said companies, or their successors in interest under said Act of July 2, 1964, and said joint resolution of May 31, 1870, or in other Acts or resolutions supplemental thereto, and all other questions of law and fact presented to the joint congressional committee appointed under authority of the said joint resolution of Congress of June 5, 1924 (Forty-third Statutes, page 461), notwithstanding that such matters may not be specifically mentioned in this enactment." * * *

"Sec. 6. * * * To carry out this enactment the court may render such judgments and decree as law and equity may require."

Third. These petitioners adopt and make part hereof the same as if reiterated and set out verbatim herein Paragraphs 43 to 67, both inclusive, being the cross bill portion, of the answer of the Northern Pacific Railroad Company filed by these petitioners in this cause on September 3, 1937 and the same is made a part hereof [847] by reference and is to be read and considered by the Court as a part hereof, with the correction, qualification or additional allegation that the deed in Paragraph 44 is copied from JCC, Part 5, page 3047, which gives the date of acknowledgment as May 3, 1895 and there is another similar deed in the Interior Department acknowledged May 3, 1875. These petitioners have not sufficient information at this time to determine whether or not there were two similar deeds in different years, one in 1895 and one in 1875.

Fourth. These petitioners and other stockholders opposed and protested the so-called foreclosure or reorganization of 1896 of the railroad company and they vainly endeavored to obtain all the facts, transactions and dealings connected with same but were constantly thwarted, rebuffed, circumvented and prevented by the officials of the railroad and railway companies and those associated with them. Thus not being able to obtain any proper and necessary information, data, facts and relief from the

officials of the company, these petitioners and others similarly situated began seeking a Governmental and a Congressional investigation to aid them in securing such information, data and facts. They continued in such efforts until they finally succeeded in obtaining the investigation by the Joint Congressional Committee, which resulted in the different reports and Act of June 25, 1929, under which this suit was filed. For further allegations see Paragraph 55 of the cross bill, which is made a part hereof.

Fifth. On November 20, 1900 Joseph Hoover, the owner of 250 shares of the common stock of the railroad company of the par value of $100, which he acquired in 1893, filed a suit in equity on behalf of himself and such other stockholders of the Northern Pacific Railroad Company as might intervene and become parties thereto in the Circuit Court of the United States (now the District Court) for the Southern District of New Yok (file No. P 7662) against the said railway company, railroad company, J. P. Morgan & Co. and the voting trustees [848] of the railway company and various parties interested in the so-called foreclosure and reorganization of 1896, attacking the said so-called reorganization of 1896, seeking discovery and seeking to have the railway company held to be a trustee holding all the properties and securities of the railroad company in trust for the plaintiff as such stockholder and all other stockholders similarly situated.

After the filing of the Hoover suit and the answers therein, efforts were renewed for a Congressional investigation and it was sought to have the stockholders of the railroad company assist in obtaining such investigation, but this was thwarted and prevented by the officials of the railway company and at the annual meeting of the stockholders on October 16, 1902 the following action is shown by the minutes:

"Mr. Geo. H. Earl offered the following preamble and resolution and moved their adoption. The motion was seconded by Mr. A. H. Gillard, to-wit:

"Whereas, the stockholders of the Northern Pacific Railroad Company in annual meeting assembled have full knowledge of all the proceedings and records upon the foreclosure of its mortgages and the purchase of its railroad land grant and property by the Northern Pacific Railway Company, therefore, be it

"Resolved: That the stockholders of the Northern Pacific Railroad Company expressly dissent from any action pretending to be taken in the name of or on behalf of the stockholders of this Company in anywise bringing in question in Congress or in any State of the United States the validity and completeness of such foreclosure proceedings or the title of the Northern Pacific Railway Company to its railroad land grant and property formerly of this

company, and declares any statements or action questioning the same as unwarranted and unfounded in law and in fact.

"Upon motion the meeting proceeded to vote upon the foregoing preamble and resolution by stock vote. The Secretary was directed to take and report the vote thereon. The Secretary duly performed his duty,—a vote was duly taken and the Secretary reported as follows:

"In favor of the said preamble and resolution 770,712 shares against the same 3,659 shares.

"Whereupon the Chairman declared that the motion made by Mr. Earl and the preamble and resolution referred to were duly adopted.

"While the voting was in progress, Mr. McCullen objected to any vote being cast upon said motion for or in behalf of the Northern Pacific Railway Company." [849]

That from October 16 1902 to the meeting of October 21, 1937, when the following resolution was rejected, the railway company and its officials at most, if not all, of the meetings of the railroad company thwarted and prevented any investigation of the affairs of the railroad company by Congress or otherwise and thwarted and prevented and refused to give relief to the non-assenting stockholders and to right the affairs of the railroad company.

"RESOLUTION

Whereas, at various meetings of stockholders of the Northern Pacific Railroad Company, a Federal Corporation, held in the City of New York since the year 1896, and down to and including the year 1934, resolutions have been offered on behalf of stockholders who had not assented to the so-called reorganization of said Company in the year 1896, whereby the property and assets of the Northern Pacific Railroad Company had been turned over to a corporation of the State of Wisconsin, formerly known as the Superior and St. Croix Railroad Company, and now known as the Northern Pacific Railway Company, and

Whereas, such resolutions so heretofore offered at said various meetings of the stockholders of the Northern Pacific Railroad Company were so presented in order to protect and preserve the rights of said Federal Corporation and all of the stockholders thereof, and looking toward a re-establishment and restoration of the interests of the Northern Pacific Railroad Company in the property and assets of said Company so turned over to said Wisconsin Corporation,

Whereas, at said various meetings of such stockholders, the Northern Pacific Railway Company, the Wisconsin Corporation above

referred to, purporting to act as the owner of more than seven hundred thousand (700,000) shares of the stock of the Northern Pacific Railroad Company, voted said stock by proxy against and defeated such resolutions looking to the relief of the said Federal Corporation and its stockholders, or voted to prevent adoption of the same, and

Whereas, the said Wisconsin corporation through its purported majority stock ownership as above mentioned, has since 1896 caused to be chosen its own nominees for directors and officers of said Federal Corporation and thus has dominated and controlled all the corporate activities of said Federal Corporation and has repeatedly thwarted the efforts of minority stockholders to obtain redress by action of the Federal Corporation, and

Whereas, in a certain proceeding in equity now pending in the District Court of the United States for the Eastern District of Washington, wherein the United States of America is plaintiff, and the Northern Pacific Railway Company and others, are defendants, steps have been taken by Walter L. Haehnlen, on behalf of himself and other minority stockholders of the Northern Pacific Railroad Company, for the protection of said Federal Corporation and its stockholders, whose annual meeting is being this day held in the City of New York, State of New York, [850]

Now, Therefore, Be It Resolved, by the stockholders of the Northern Pacific Railroad Company in annual meeting assembled in the City of New York, State of New York, that the incoming Board of Directors of the Northern Pacific Railroad Company be and they are hereby directed to lend all possible aid and assistance to the efforts so as above instituted by Walter L. Haehnlen in said above mentioned suit, to the end that the rights of the Northern Pacific Railroad Company and all its stockholders may be protected and preserved, and that an adjudication thereon be had in and by the Court having jurisdiction of the said cause."

The railway company voted its 770,673 shares of stock against the resolution and accordingly it was defeated, as only 1,573 other shares were present and voted for the resolution.

On October 15, 1903 at the annual meeting of the stockholders of the Railroad company Francis Lynde Stetson, a Director of the railroad company, and a director and general counsel of the railway company, offered a resolution, which was adopted as follows:

"Resolved that the stockholders of the Northern Pacific Railroad Company in annual meeting assembled hereby approve of all of the action of the stockholders of the Superior and St. Croix Railroad Company and of the North-

ern Pacific Railway Company in the years 1895 and 1896 to which reference is made in the third and final preamble to the Resolution this day offered by Joseph P. McCullen as proxy, and though disclaiming any interest in the stock of said Superior & St. Croix Railroad Company, request the Board of Directors of this Company to take any and all such action as it may deem proper or suitable to give full and final effect to such action and to this approval thereof and also to this disclaimer."

Referring to Paragraph 54 of the cross bill, petitioners further allege that the stock of the non-assenting stockholders of the railroad company was never forfeited or cancelled but was always recognized and notices given them and they attended and without objection took part in and voted at all the meetings of the stockholders of the railroad company, at which meetings practically all of the stock of the railroad company, except the non-assenting stockholders, was voted by the officials of the railway company.

The Mr. McCullen mentioned in the above proceedings was the same J. P. McCullen who represented these petitioners and whose briefs and statements are set out in the hearings of the JCC.

In the following year, 1903, depositions of various parties were taken on behalf of the plaintiff in the Hoover suit, both in the West [851] and in New York, and then there were negotiations between

counsel looking to settlements and discussion by correspondence between counsel and further taking of depositions and further efforts for a Congressional investigation, extending up to 1922 and later.

During this period Hoover, the plaintiff in that suit, these petitioners and others were still earnestly and continuously seeking a Congressional investigation, realizing that they could never uncover the true facts, data, information and the illegal and unlawful acts, deeds, transactions and doing of the officials of the railway company and the railroad company and the members of the stockholders protective committee, the bondholders committee, the members of the syndicate and the managers and others associated and allied with them in the so-called foreclosure or reorganization of 1896 by a suit in equity for discovery without the aid and assistance of a Congressional investigation.

The information that these petitioners have indicates that during this period and at all times after the taking of such depositions as the plaintiff took the railway company and railroad company did not desire to have the Hoover suit go to trial and they made no effort whatever to bring it on for trial but continued to prolong the matter by negotiations and discussions of settlement, Government investigation, or the taking of further testimony until the death of Francis Lynde Stetson, general counsel and attorney for all the defendants in the Hoover

case, about 1921, when the railway and railroad companies then tried to forget the case and ignore it, hoping that as John G. Johnson of Philadelphia, one of the attorneys for plaintiffs, was dead, it would not be further prosecuted. But these petitioners are informed that the suit has been kept alive, that Hoover's executor has been substituted as plaintiff, and is preparing to file further depositions.

The following are letters between counsel in the Hoover case: [852]

"6326 Drexel Road
Philadelphia, December 21st, 1921

In Re Northern Pacific R. R. Co.

Charles MacVeagh, Esq.
Mills Building, 15 Broad Street,
New York City, N. Y.

My dear Mr. MacVeagh:—

Shortly after the annual meeting of the stockholders of the Northern Pacific Railroad Company, last year, I called upon you to inquire as to what might be the likelihood of an amicable adjustment with the stockholders whom I had represented for some years, and who had not assented to the Morgan reorganization.

Though hoping for some favorable word from you I received no message of any kind.

Another annual meeting has taken place, and no settlement having been made or suggested, I am now asked to permit other counsel to suc-

ceed me since my present official position forbids my connection with the litigation, and I am requested to place with such succeeding counsel whatever data I may have at hand.

It has occurred to me that I should tell you why these stockholders continue so hopeful and so persistent in the assertion of their claims.

A gentleman, now deceased, whose name you would be familiar with if mentioned, whose standing as a lawyer was of the very highest, and who was familiar with the financial arrangements of both the Northern Pacific Railroad Company and the Northern Pacific Company made to me and to certain of my clients this statement:—

> 'There is, I am sure, a vital defect in the Northern Pacific reorganization. It involves a serious breach of trust and lapse of time will never cure it. This gives value to your stock. I cannot furnish you with the details, you must search them out, but I can say you are upon a danger line for the other side in making inquiries about the connections at Duluth and Superior and in Minnesota.'

This statement was accepted as a guarantee both of the merit and of the ultimate success of the claims represented. It led to investigation as to certain land grant lines east of the Missouri River which were combined with the land grant lines of the Northern Pacific.

It also led to inquiry as to the course pursued in the earlier readjustment or reorganization of 1875 upon foreclosure of the Jay Cooke mortgage.

Distinction was found to have been maintained between land grant 'lines' or railroad 'lines' and lines of railroad construction, a single construction representing more than one 'line' of railroad and a 'lease' of unbuilt railroad of the Northern Pacific was entered upon under a 'construction contract.'

In 1875 the unbuilt road was estimated at 1483.36 miles, which taken with other lines of 370.84 miles, made 1854.20 miles, for which were issued Bonds at $20,000

per mile, or	$37,084,000
and Preferred Stock at $30,000	
per mile, or	55,626,000
Making together,	$92,710,000

[853]

These basic securities were allotted as follows:

20% thereof to the company			
Viz. Bonds	$ 7,416,800		
Preferred Stock	11,125,200	$18,542,000	
30% thereof to the old Common stock and 'Original Proprietary agreement' interests			
Viz: Bonds	$11,125,200		
Preferred Stock	16,687,800	27,813,000	
50% thereof to the Bondholders and others who became 'Preferred Stockholders' under the Plan of 1875			
Viz: Bonds	$18,542,000		
Preferred Stock	27,813,000	46,355,000	$92,710,000

Later these securities (allotted in similar proportions) were increased so as to be:—

Bonds	$37,500,000
And Preferred Stock	56,250,000
Making together,	$93,750,000

These basic securities did not go out to the public to be dealt in, but were deposited and held in trust, and were the muniments of title to the Northern Pacific Railroad and Land Grant. These securities did not pass by means of the foreclosure sales of 1896 but were acquired by means of the arrangement and agreement entered into by the Reorganization Managers with the Directors of the Northern Pacific Railroad Company and with certain fiduciaries in violation of the trust under which the earlier reorganization of 1875 was effected.

This is the situation presented through the information given us and it would seem that the non-assenting stock-holders are entitled to an accounting.

Very truly yours,
(s) JOSEPH P. McCULLEN"

"Stetson Jennings & Russell
Attorneys and Counsellors At Law
Mills Building, 15 Broad Street
New York

February 21, 1922

My dear Judge:

I owe you an apology for the delay in further answering your letter of December 21, 1921, which was received just prior to the Christmas holidays and about which I wrote you.

I have conferred on the subject with Mr. Gardiner, who has knowledge of the 1896 reorganization of the Northern Pacific Railroad [854] Company and has been familiar with the proceedings of the Northern Pacific Railway Company, including the suit brought by you many years ago, and with your subsequent correspondence from time to time with our late partner, Francis Lynde Stetson, in respect to the claims of Northern Pacific Railroad stockholders who failed to participate in the reorganization. If we understand your letter correctly, the point which you now present was set out in your letter of November 3, 1914, to

Mr. Stetson, and to this letter he replied under date of November 13, 1914. Subsequently, in a letter to Mr. Stetson dated March 27, 1916, you presented the same point with some variations; and to this he replied under date of March 28, 1916. In this last mentioned letter Mr. Stetson advised you of the position of the Company at that time and, so far as I am advised, this has not changed.

I am, my dear Mr. McCullen,

Very truly yours,

(s) CHARLES MacVEAGH

Honorable Joseph P. McCullen,
6326 Drexel Road,
Philadelphia,
Pennsylvania."

During the winter of 1917 and 1918 the railroad were taken over, operated and held by the United States until March, 1920.

These petitioners are informed, believe and charge that there was other correspondence and other negotiations between counsel in the Hoover case between 1916 and 1922 and later.

Sixth. The land grant was conferred by Congress with the thought that it would fully pay for the construction of the railroad and Josiah Perham, at the first meeting of the Board of Commissioners, averred that he deemed the lands sufficiently valuable to not only pay for the construction of the railroad but to leave for the stockholders more than

three hundred and fifty millions of dollars besides. The great value of the land grant has always been recognized, and as late as in the proceedings for the receivership of 1893 (preliminary to the reorganization of 1896) in the creditors' bill filed in August, 1893 by P. B. Winston and others against the Northern Pacific Railroad Company, in the United States Circuit Court for the District of Minnesota, Third Division, (No. 638, Equity "C"), it was averred in connection with the land grant that if the lands could be taken into judicial custody "the proceeds that will be received from such sales, [855] together with the earnings of the defendant's railway system will be more than sufficient to pay and discharge all of the defendant's obligations to its creditors, and preserve for its stockholders said railway system freed from debt."

The valuation of three hundred and forty-five millions of dollars ($345,000,000) placed upon the Northern Pacific Estate in and by the plan of March 6, 1896 and the agreement of July 13, 1896, and later admitted by the railway company's officials to be the actual value, is more than one hundred and three millions of dollars in excess of all liabilities of the railroad company, including its capital stock, as appears by its last report to August 31, 1896, filed with the Railroad and Warehouse Commission of Minnesota and with the Interstate Commerce Commission at Washington, and it is more than one hundred and eighty-seven millions of dollars ($187,000,000) in excess of all the liabil-

ities of the railroad company to said date exclusive of its capital stock of $84,205,446, as per said reports:

The total liabilities of the railroad company on August 31, 1896, including all its outstanding capital stock amounted to $241,975,270.96, whilst the cost of construction and equipment of the railway company on the following day, September 1, 1896, is reported at $306,639,886.35, an increase of more than $64,000,000, and it had never constructed or bought a foot of trackage except what was built for it by the railroad company and included in the railroad company's property, as elsewhere herein alleged, except possibly four miles built in July, 1896.

The total liabilities of the railroad company on August 31, 1896, excluding capital stock, amounted to $157,769,824.10, whilst on the following day September 1, 1896, the cost of construction and equipment was placed at $148,870,062.25 in excess of this, to-wit, at $306,639,886.35 as above stated.

The total assets of the railroad company on August 31, 1896, exclusive of equipment are stated in the report to be $216,157,165.40. [856]

The item of cost of property exclusive of equipment as of September 1, 1896, with the railway company is $293,947,706.35, an increase of $77,790,540.95.

In the assets of the railroad company appears an item in this report of August 31, 1896—"Assets

transferred to Northern Pacific Railway Co.—$2,769,441.91", without any explanation.

The Railway company filed a statement in Montana dated July 13, 1896 and sworn to by President Adams and Secretary Gardiner, in part as follows:

"2. The amount of its capital stock is one hundred fifty-five millions of dollars, divided into shares of 100 each the aggregate of which $75,000,000 are preferred stock and $80,000,000 are common stock.

3. The amount of its capital stock actually paid in in money is $4,300.

4. The amount of its capital stock paid in otherwise than in cash is $154,995,700, and the same was paid in by the sale and transfer to the company of stocks, bonds, and securities formerly of or belonging to the Northern Pacific Railroad Co. or of interests therein.

5. The amount of assets of the corporation is $4,100 in cash and the stocks, bonds and securities before mentioned, or interests in the stocks, bonds and securities before mentioned, of or formerly belonging to the Northern Pacific Railroad Co., to an aggregate amount of which the actual cash value exceeds $40,000,000.

6. The liabilities of such corporation are such as have been incurred for and in connection with the purchase of the property of the said Northern Pacific Railroad Co.; and while not yet specifically formulated, an indebtedness equal to or not exceeding the sum of $190,000,-

000 has been or will be created by the said corporation, all of which will be secured by mortgages upon the property, franchises and railroads now or formerly of the Northern Pacific Railroad Co.

City of New York,
County of New York, State of New York, ss:

In attestation of the truth of the foregoing statement, we, the undersigned, constituting a majority of the board of directors of the Northern Pacific Railway Co., have hereunto set our hands this 13th day of July, A. D. 1896.

EDWARD D. ADAMS
A. H. GILLARD
MORTIMER F. SMITH
VICTOR MORAWETZ
GEORGE H. GARDINER
W. PAXTON LITTLE
J. W. ALMY, JR.
FRANCIS LYNDE STETSON

[857]

City of New York
County New York, State New York, ss:

Edward D. Adams, president, and George H. Gardiner, secretary, of the Northern Pacific Railway Co., a corporation, which makes the foregoing statement, each being first duly sworn upon his oath, says that he has read the foregoing statement, and that the same is true, and said affiants further say that the above signa-

tures of directors are genuine and that the signers constitute a majority of the board of directors of the corporation.

Subscribed and sworn to before me this 13th day of July, A. D. 1896.

EDWARD D. ADAMS
GEORGE H. GARDINER

In witness whereof I have hereunto set my hand and affixed my official seal the day and year last above written.

[Seal] JOSEPH B. BRAMAN
Commissioner of Deeds for the State of Montana.
In and for the State of New York, Resident in said city of New York."

The statement that only $4,300 was "actually" paid in in cash on railway company stock contradicts and overcomes any claim that the so-called deposits of $10.00 and $15.00 on railroad stock was in payment for railway company stock.

Any contention that the deposits were on the railway company stock is contrary to the Wisconsin statute in force in 1896 which provided as follows:

"No corporation shall issue any stock or certificate of stock except in consideration of money or labor or property estimated at its true money value, actually received by it equal to the par value thereof," etc.

On April 18, 1899, on appeal of those interested in sustaining the reorganization for the Northern Pacific Railway Company the statute was amended by adding thereto this proviso, which is null and void as attempting indirectly to amend the railway company charter to give powers which could not under the constitution be done directly:

> "Provided that nothing in this section contained shall apply to any issues of stock or of bonds heretofore or hereafter made by any railroad corporation in accordance with any plan of reorganization adopted by the holders of the greater amount of the bonds, or of the stock of any insolvent railroad corporation whose railroad wholly or partly within this state, has been sold or hereafter shall be sold at mortgage sale, or in bankruptcy or at other judicial sale and acquired by the railroad corporation making such new issue of stock or of bonds or of both; and any and all such issues heretofore made in conformity with any such plan of reorganization are hereby legalized, ratified and confirmed." [858]

A void amendment of Section 1788 of the revised statutes of Wisconsin relative to reorganization was likewise obtained by the same parties on April 18, 1899, by adding thereto the following:

> "Any railroad corporation existing under the laws of this state, with the authority or the approval of the holders of a majority of the

shares of its capital stock given either in writing or at a meeting called for that purpose, may purchase any railroad and other property, franchises, rights and immunities, in this or any other state or states, of any insolvent railroad corporation whose railroad shall be sold at mortgage sale, or in bankruptcy or upon any other judicial sale, provided that the railroad so purchased shall not be parallel or competing with any constructed railroad owned or controlled and operated by the purchasing corporation, and shall be a continuation of, or be connected with, or intersected by, a line of railroad owned, leased or operated by such purchasing corporation, or which it shall be authorized to build; and in consideration of such railroad and other property, franchises, rights and immunities, so purchased, any such purchasing railroad corporation may issue and deliver its own bonds and shares of its capital stock, in such amounts and at such prices, and on such terms and conditions, including any terms and conditions as to voting power and dividends in respect of any such stock as shall be so approved by the holders of a majority of the stock of such purchasing railroad corporation; and any and all purchases, and issues of stocks and of bonds such as are authorized by this act, heretofore made by any railroad corporation existing under the laws of this state are hereby legalized and confirmed."

This void amendment seemingly fails to authorize the purchase of property or stock of a foreign or Federal Corporation, and the amendment is prohibited from applying to or affecting the railroad company by Roberts vs. Northern Pacific Railroad Company, 158 U. S. 1; 39 L. ed. 873 hereinafter quoted in Paragraph 15.

Seventh. The invalid so-called reorganization of 1896 was not, as customarily is done, left to a committee by J. P. Morgan & Company were made Reorganization Managers and all of the assenting stock of the railroad company was sold to them so they could and did exercise the right of ownership and voting and they also voted during the same period the stock of the railway company. For further allegations see Paragraph 57 et seq. of the cross bill, made a part hereof.

The Reorganization Managers pursuant to an arrangement with the officials of the railroad corporation undertook to deal with the property itself of the railroad corporation by treating the share certificates as equivalent to the property itself. In the Reorganization Agreement (Paragraph 5) it was thus stipulated as to this [859] "in every case all the provisions in the plan and this agreement shall equally apply to and in respect of any physical properties embraced under the re-organization, and to and in respect of any securities representing any such property, it being intended that for all purposes thereunder, any such property and any security representing such property may be treated

or accepted by the Managers as substantially identical."

Pursuant to this the Reorganization Managers on July 13, 1896 entered into an agreement with the railway company under which they expressly agreed to place in the name of the railway company the "property and franchises" of the railroad corporation and under this agreement there was issued by the railway corporation to the Reorganization Managers in payment of the purchase price,

New Common Stock	$ 80,000,000
New Preferred Stock	75,000,000
New Prior Lien Bonds	73,816,500
New General Lien Bonds	56,000,000
Total stock and bonds issued to the Reorganization Managers in payment of the property	$284,816,500

This agreement was made July 13, 1896, which was prior to the foreclosure sale, and the $155,000,000 of stock was issued to the Reorganization Managers as part of the payment on July 13, 1896, prior to the foreclosure sale.

In speaking, in 1903, of the agreement of July 13, 1896, Francis Lynde Stetson, general counsel and director of, and speaking for, the railway company, said that the railway company by amendment to its charter was authorized to purchase a railroad from Lake Superior to the Pacific Coast, that the only railroad answering that description was the

Northern Pacific Railroad Company and that "the only way of acquiring that railroad was by the acquisition of the securities then in the possession of the Re-organization Committee." [860]

Relative to the distinction between the securities and the property itself covered by securities he testified: "Now I cannot see that there is any distinction between those. There is an inconsistency in your mind but there is none in mine, for I think the substance and the shadow are the same."

He further said, "If I hadn't supposed that that Wisconsin corporation would thereby acquire the property of the Northern Pacific Railroad, I never would have approved of that contract; but I supposed that that would be the effect of the contract as it was."

The Re-organization Managers undertook as stockholders and as proprietors of the company to deal with the property itself and under the agreement of July 13, 1896, agreed to get in all the old stock of the Federal Corporation.

On September 1st, 1896, however, when the railway company entered into possession of the property there was outstandng of the old stock of the Federal Corporation which the Reorganization Managers had not acquired shares amounting to the par value of something over $9,100,000.

In April of 1897 the Reorganization Managers filed their report and account with the railway company and they turned back and delivered to the railway company about $9,246,000 of the new securities which had been created and issued to

them (the Reorganization Managers) in payment for the railroad company property. This turning back or re-delivery was made, however, by Morgan & Co. under the express condition that the railway company "now and at all times will indemnify and will hold us harmless against every claim, liability and obligation of every name and nature which may have been incurred by us or which may be asserted against us in respect of any of our acts, proceedings, omissions or defaults as Reorganization Managers."

Pursuant to this the railway company passed a resolution setting forth in brief: [861]

> "Resolved that this Company hereby accepts and receives from the said J. P. Morgan & Co. the said assets this day delivered, upon the condition of its assumption, and it hereby assumes all and every, of the outstanding liabilities of the said J. P. Morgan & Co. in respect of any property purchased, or undertakings given, or of any and all assumptions of any kind by them made in respect of any of their transactions or of any of the property connected with their transactions as such Managers" . . . Then follows an agreement to indemnify Morgan & Co., "against any and all persons whomsoever and from any and all claims and liabilities of every name and nature whatsoever arising or resulting from or connected with any act, omission or default of them or of any member of them from, in the execution or performance, or in the attempted execution or performance of the

said plan and agreement of March 16th, 1896, or of the agreement between the said J. P. Morgan & Co. and this company dated July 13, 1896."

The plan provided "the managers as they may deem necessary may defer the performance of any provision of the plan of this agreement or may commit such performance to the new company," being the railway company.

Having thus assumed the liabilities of J. P. Morgan & Co., Reorganization Managers, one of which liabilities was to acquire and turn over all the outstanding stock of the railroad corporation, the railway company in its first report filed with the Railroad Commissioner of Wisconsin subsequent to the reorganization, has added to the "cost" of the property acquired as of September 1st, 1896 the $9,100,000 and odd, the par value of the old stock of the railroad corporation which had not then been gotten in.

Said report shows "Total cost as of September 1st, 1896, of property purchased at foreclosure $293,947,706.35

Whilst it is admitted and it is shown by the printed annual report that all the stocks and bonds issued in payment as of September 1st, 1896, amounted to 284,816,500.00

Making the difference in "cost" charged up but not paid $ 9,131,206.35

This is about the par value of the old railroad company stock that was not gotten in, which included the stock owned by these petitioners and those cooperating with them, amounting to approximately 32,559 shares of the par value of $3,255,900 as alleged hereinbefore. [862]

That between September 1st, 1896 and June 30th, 1897 about 9,000 shares additional of the old railroad company stock were gotten in by the railway company, the same being of the par value of $900,000 and during that period about $996,000 additional Prior Lien Bonds were issued "in exchange for the property."

These petitioners are informed, believe and so charge that the Reorganization Managers were required to account for all of the securities, all of the stocks and all of the bonds of the railroad company, "in the hands of the Public," (See also page 6 of their report and accounts) and that the railway company assumed liability for all of the old outstanding stock of the railroad corporation which Morgan & Co. were to have acquired for the railway company, as also evidenced by its charging up the value of such stock as an item of cost and by its agreement to assume the liabilities of Morgan & Co., all of which is in accord with the true purpose and intent of the agreement of July 13, 1896.

Eighth. The agreement between Morgan & Company as the Reorganization Managers and the railway company, Exhibit N to the bill (Printed Exhibits Volume 1, page 189) was dated July 13, 1896,

twelve days before the date of the fake and so-called foreclosure whereby the Reorganization Managers agreed to vest in the railway company "the ownership of all of the stocks, bonds or other property representing the system formerly of the Northern Pacific Railroad Company. The use of the word "formerly" was to emphasize the fact that the title was out of the Northern Pacific Railroad Company prior to the fake and so-called foreclosure sale and such was the intent and purpose of the Plan and Acts and they were so construed by the parties thereto at the time.

The stocks and bonds of the railway company were issued and delivered July 13, 1896 to pay for all the property, franchises, securities and assets of the railroad company as an outright sale and which were delivered to the railway company. The sale as made is set out in the following documents:

[863]

"New York, July 13, 1896

To the Northern Pacific Railway Company.

Dear Sirs:—

"In performance of the agreement this day made between your corporation and ourselves, as Reorganization Managers of the Northern Pacific Railroad Company, we hereby transfer and deliver to you, as in said agreement proposed, all the right, title and interest held by us as Reorganization Managers, in and to the stocks, bonds and securities mentioned in the

schedule hereunto annexed, and as therein specified.

"And we further agree, from time to time hereafter as the same shall come into our possession and under our control as such Reorganization Managers, to transfer and deliver to you all of the property, franchises, stocks and bonds of the Northern Pacific Railroad System, as acquired and received by us as such Reorganization Managers.

"In consideration thereof we hereby request you to deliver to us, in pursuance of said agreement, certificates of the fully paid, non-assessable Preferred Stock of the Northern Pacific Railway Company for $75,000,000 and certificates of the fully paid, non-assessable Common Stock of the Northern Pacific Railway Company for the aggregate amount of $80,000,000.

"And we further request you from time to time, when the same shall have been executed, to deliver to us Prior Lien Bonds of the Northern Pacific Railway Company for the aggregate principal sum of $130,000,000, and General Lien Bonds of the Northern Pacific Railway Company for the aggregate principal sum of $60,000,000 as in said agreement provided.

"Requesting your acknowledgment of this delivery, were are,

Yours very truly,

J. P. MORGAN & CO.

Reorganization Managers of the Northern Pacific Railroad Company."

"SCHEDULE.

Annexed to the Reorganization Manager's Letter, July 13, 1896, to the Northern Pacific Railway Company $24,493,000.00 Northern Pacific Railroad Co. General First Mortgage Bonds, $19,078,000.00 Northern Pacific Railroad Co. General Second Mortgage Bonds, $11,267,-000.00 Northern Pacific Railroad Co. General Third Mortgage Bonds, $490,217.00 Northern Pacific Railroad Co. Dividend Scrip, $44,923,-000.00 Northern Pacific Railroad Co. Consolidated Mortgage Bonds, $9,493,000.00 Northern Pacific Railroad Co. Collateral Trust Notes, $33,148,506.82 Northern Pacific Railroad Co. Preferred Stock, $41,902,400.00 Northern Pacific Railroad Co. Common Stock, $3,000,000.00 Northwest Equipment Co. Stock, [864] $349,-000.00 Coeur d'Alene Railway Co. First Mortgage Bonds, $650,000.00 Northern Pacific & Manitoba Terminal Bonds, $306,000.00 Helena & Red Mountain Railroad Co. Bonds, $962,-000.00 James River Valley Railroad Co. Bonds, $5,157,000.00 Northern Pacific & Montana Railroad Co. Bonds, $1,569,000.00 Spokane & Palouse Railroad Co. Bonds.

(signed) J. P. MORGAN & CO.
Reorganization Managers."

"New York, July 13, 1896.

Messrs. J. P. Morgan & Co.,
Reorganization Managers of the
Northern Pacific Railroad Company.

Dear Sirs:—

Referring to your letter of this date, the Northern Pacific Railway Company hereby acknowledges that it has received from you the stocks, bonds, and securities therein mentioned, and also accepts your promise and agreement from time to time hereafter to deliver the property, franchises, stocks and bonds of the Northern Pacific Railroad System as stated by you.

In consideration of such delivery, this Company hereby issues and delivers to you its certificates for its fully paid, non-assessable stock, as follows:

(a) Preferred stock to the aggregate amount of $75,000,000

(b) Common stock to the aggregate amount of $79,995,700 the remaining $4,300 of common stock having heretofore been issued and being held by the Directors of this Company as qualifying shares.

At the same time, this Company hereby notifies you that your firm has been appointed to be and to act as the Fiscal Agents of this Company until further notice, and it hereby requests that as such Fiscal Agents, you will, in behalf and for the account of this Company,

and subject to its direction, hold in your possession, or subject to your control, the several stocks, bonds and other securities by you this day delivered to this company in pursuance of the agreement aforesaid.

You are hereby requested to acknowledge the receipt of this communication, and your acceptance of this appointment and trust.

NORTHERN PACIFIC RAILWAY COMPANY

By EDWARD D. ADAMS,

[Seal] President.

George H. Gardiner,

Secretary." [865]

"New York, July 13, 1896

To the Northern Pacific Railway Company,

Dear Sirs:—

Referring to your communication of this date, we herewith advise you that we have received the same, and that we accept appointment, as therein stated, of the position of Fiscal Agents of the Northern Pacific Railway Company, and as such Fiscal Agents will hold the stocks, bonds and other securities mentioned in your communication, subject to the terms therein stated.

We are,

Yours very truly,

J. P. MORGAN & CO."

"Extract From Minutes of Meeting of Board of Directors of
Northern Pacific Railway Company
Held April 29th, 1897

The following letter was read:

New York
New York, April 29, 1897.

To the Northern Pacific Railway Company:

Gentlemen—We beg leave to refer you to the account of our proceedings filed with your Board, contained in the pamphlet entitled 'Report and Accounts of J. P. Morgan & Co., as Reorganization Managers of the Northern Pacific Railroad Company (under Plan and Agreement of Reorganization, dated March 16, 1896),' together with the certificate of the Comptroller of your Company, verifying and attesting to the accuracy thereof.

From these accounts, it will appear that, as Reorganization Managers, we have accounted fully for all the property and assets by us received, excepting the following securities:

$ 10,500	Northern Pacific Railway Co. Prior Lien Bonds.
3,380,000	Northern Pacific Railway Co. General Lien Bonds.
4,086,300	Northern Pacific Railway Co. Preferred Stock, Trust Certificates.
2,500,000	Northern Pacific Railway Co. Common Stock, Trust Certificates.

Herewith we hand you all of said securities, except $10,500 Prior Lien bonds and $880,000 of the General Lien Bonds, which we reserve to indemnify us against any unsettled claims or liabilities growing out of the reorganization.

All the foregoing securities are now transferred to, and are to be accepted by, your Company upon the express condition that your Company now and at all times will indemnify, and will hold us harmless against [866] every claim, liability and obligation of every name and nature which may have been incurred by us, or which may be asserted against us, in respect of any of our acts, proceedings, omissions or defaults as Reorganization Managers.

Yours very respectfully,
J. P. MORGAN & CO.

The letter of J. P. Morgan & Co., the certificate of the Comptroller, and the pamphlet enclosed in said letter, having been carefully considered and generally examined, the following preambles and resolutions were adopted by the affirmative vote of every Director present excepting Messrs Coster, Bacon and Stetson, who retired from the room and refrained from voting:

Whereas, The Accounts of Messrs. J. P. Morgan & Co., the Reorganization Managers of the Reorganization of the Northern Pacific Railroad Company, under the Plan and Agree-

ment dated March 16, 1896, have been duly filed with the Board of Directors of the Northern Pacific Railway Company, this being the new company organized under such Plan and Agreement, within one year after the completion of its organization, all as provided in Article Ninth of said Agreement; and

Whereas, All of such accounts have been duly examined by or in behalf of this Board and in all particulars have been found to be correct; and

Whereas, It has appeared, to the satisfaction of this Board, that all the purposes of the plan of reorganization have been accomplished, that all the expenditures of the said Managers have been properly made, and that all moneys and securities and other assets at any time by it received have been properly accounted for and have been turned over to this Company, except $10,500—Prior Lien Bonds and $880,000 General Lien Bonds of the Northern Pacific Railway Company, which, with the assent of this Company, have been reserved by J. P. Morgan & Co. for the purposes set forth in their letter of April 29, 1897; and

Whereas, The Managers have made their final report, and have transferred the various securities to this Company upon the express condition that the Managers shall be fully

indemnified against any and all claims of every name and nature;

Now, Therefore, It is Hereby

Resolved, That the said accounts of the J. P. Morgan & Co., the Reorganization Managers, be, and they are hereby, audited and approved by the Board of Directors of the Northern Pacific Railway Company, and the same are hereby, declared to be in all respects final, binding and conclusive upon this Company and upon all the parties having any interest therein, and said J. P. Morgan & Co. and each member thereof respectively are hereby released from all liability of every name and nature in respect of each and every of their transactions as Reorganization Managers except that J. P. Morgan & Co. shall duly account for the $10,500 Prior Lien Bonds and $880,000 General Lien Bonds by them reserved as aforesaid.

Resolved, Further, That this Company hereby accepts and receives from the said J. P. Morgan & Co. the said assets this day delivered, upon the condition of its assumption, and it hereby assumes all and every, of the outstanding liabilities of the said J. P. Morgan & Co. in respect of any property purchased, or undertaking given, or of any and all assumptions of any kind by them made in respect of any of their transactions or [867] of any of the property connected with their transactions as such Managers; including especially all liabilities

and undertakings growing out of the correspondence set forth in said report under the headings 'Chicago and Northern Pacific' settlement and 'Wisconsin Central' settlement; this Company hereby agreeing to carry out all such undertakings; and the Northern Pacific Railway Company hereby expressly agrees to protect and to hold harmless the said J. P. Morgan & Co., and each and every member thereof, against any and all persons whomsoever, and from any and all claims and liabilities of every name and nature whatsoever, arising or resulting from or connected with any act, omission or default of them or of any member of them, from, in the execution or performance, or in the attempted execution or performance, of the said Plan and Agreement of March 16, 1896, or of the Agreement between the said J. P. Morgan & Co. and this Company, dated July 13, 1896. And it declares that in all and every particular the said J. P. Morgan & Co. and the members thereof have fully complied with and have performed all of the provisions of the said Plan and Agreement of March 16, 1896, and also the said Agreement of July 13, 1896, between the said J. P. Morgan & Co. and this Company.

Resolved, that the Secretary of this Company be, and he is hereby, authorized and directed to cause to be transmitted to the said J. P. Morgan & Co. a

copy of these resolutions, duly authenticated and attested under the corporate seal by the Secretary of this Company.

I, Charles F. Coaney, Secretary of the Northern Pacific Railway Company, do hereby certify that the foregoing is a true extract from the record of proceedings of the Board of Directors of said Company at a meeting duly held pursuant to notice at 35 Wall Street, New York, April 29th, 1897.

Given under the seal of the Company this 30th April, 1897.

(signed) CHARLES F. COANEY
Secretary"

[Seal of Northern
Pacific Railway
Company]

The agreement of July 13, 1896 (Exhibit "N" to the Bill) in section 8 provided: "that the Reorganization Managers may construe said plan and its construction thereof shall be conclusive and it may supply any defect or omission"; the Reorganization Managers—Morgan & Co. construed the plan to require the purchase of all the stock of the railroad company and they charge themselves with this liability, put aside and retain securities to cover such liability, and delivered to the railway company other securities sufficient to cover same, which the railway company put aside to cover such liability and gave bond to protect the Reorganization Managers.

Ninth. The president of the railroad company,

Brayton Ives, on [868] the word of Silas W. Pettit, a director of and attorney for the railroad and attorney for the Stockholders' Protective Committee, as part of the collusive and fraudulent agreement between the Stockholders' Protective Committee and the Reorganization Managers, undertook to waive jurisdiction of the United States District Court for the District of Michigan of the subject matter of the suit and to confess judgment of foreclosure.

The Stockholders' Protective Committee could have, as was admitted later by its chairman, Brayton Ives, prevented the foreclosure and ultimately the reorganization of the railroad company on the plan followed.

The expenses of the Stockholders' Protective Committee were paid by J. P. Morgan & Co., representing the Syndicate and the Reorganization Managers.

William Nelson Cromwell was attorney for the Stockholders' Protective Committee, was attorney for Receivers Oakes, Payne and Rouse, attorney for Winston, who filed a stockholders suit against the railroad company, attorney for Adams' Reorganization or Bondholders' Committee, and attorney for George R. Sheldon, who was a director of the railroad company, member of the Stockholders' Protective Committee and member of the firm of Shelden & Co., for whom Cromwell filed the creditors suit against the railroad company.

The Stockholders' Protective Committee was a self constituted committee of Directors of the railroad company consisting of Ives, Belmont, Sheldon and Tower, who became members of the syndicate and their acts were never authorized or approved by or with consent of the stockholders nor were any of the reorganization plans or agreements authorized or approved by the stockholders of the railroad company.

The reorganization plans provided for property agreed and known to be worth $345,000,000 to be transferred for the stock and bonds of some company, later decided to be the railway company. [869]

The so-called fake foreclosure sale was at the price of $12,500,000, but all of the securities were transferred and delivered and not just $12,500,000 and then $18,000,000 of its stock was returned to the railway company in addition to securities returned in Morgan's letter of April 29, 1897, and nothing was given to the non-assenting minority stockholders. This was all just part of the scheme and plan to hold all the property and securities of the railroad company intact in the physical possession of one corporation regardless of whether any or all title or right was left in the railroad or passed from the railroad to the railway, so long as the public, knowing the facts as it did, would accept the bonds and stock of the railway company, believing that in some way the property and securities of the railroad company, worth $345,000,000, were

in some unexplained manner behind said bonds and stocks, whether by title in the railroad company reached through the railway's physical holding and possession of same or its ownership of most of the preferred and common stock of the railroad company, and thus holding the said stock of the railroad company as a trustee for the holders of the railway company's stocks and bonds.

As a further part of such scheme and plan the railway company put a clause in the mortgage or deeds of trust it executed providing for a merger or consolidation with or a conveyance to a Federal corporation of the property and securities described in such mortgages or deeds of trust, which are in truth and in fact the property and securities of the railroad company, knowing that the railroad company was the only Federal corporation such a merger or consolidation could be had with or such conveyance could be made to as Congress refused to grant in 1896 another Federal charter as urged and sought by the Reorganization Managers, Syndicate Members, Stockholders' Protective Committee, Bondholders' Committee and officers of the railroad company; Senate Resolution 124, 54th Congress, 1st Session, was introduced April 8, [870] 1896, reported favorably April 21, 1896, amended June 6-11, 1896, went over January 21-February 19, 1897 and never voted on. (See JCC, Part 4, page 2065, et seq.) The resolution is as follows:

"Mr. Mitchell, of Oregon, introduced the following joint resolution, which was read twice

and referred to the Committee on the Judiciary:

"Joint Resolution to facilitate the reorganization of the Northern Pacific Railroad Company; to secure the actual settlers the right to purchase at a price not exceeding two dollars and fifty cents per acre the agricultural lands within its grant, and to prohibit said company or any successor company from giving by consolidation, sale, or other corporate action, control of its railroad to any corporation, company, person or association of persons owning, operating, or controlling a parallel or competing railroad.

Resolved by the Senate and House of Representatives of the United States of America in Congress Assembled, that the purchasers of the railroad property of the Northern Pacific Railroad Company, which may at any time hereafter be sold at judicial sale in any suit or suits for the foreclosure of any of the mortgages heretofore executed by said company thereon, may organize anew by filing in the office of the Secretary of the Interior a copy of the deed or deeds conveying said railroad and property with a certificate signed by a majority of them, setting forth the name adopted by them, the names, number and residences, respectively, of

its directors, and a copy of any plan of reorganization adopted by said purchasers or pursuant to which such purchase shall have been made. Upon filing such certificate such purchasers, their associates, successors, and assigns shall, by the name specified in said certificate, have and be invested with all the estate, right, title, and interest of said purchasers in and to such railroad and property, and shall possess franchises, rights and powers the same as the Northern Pacific Railroad Company and shall be subject to all the obligations and duties imposed by Congress upon said company, and may acquire and hold any property and branches of the Northern Pacific Railroad Company; and it may acquire and construct additional branches or feeders in any state as authorized by the laws thereof; and upon such terms and conditions as may be provided in the plan of reorganization filed aforesaid it may from time to time issue such bonds, secured by mortgage upon its property and franchises or otherwise, not exceeding in the aggregate the sum of one hundred and ninety million dollars, and twenty-five thousand dollars additional per mile for railroad hereafter constructed, and such stocks, preferred or common, as shall have been authorized by such plan: Provided, that except as such stock shall have been issued for property acquired under such plan, no additional stock

shall be issued, except for money, labor, or property estimated at its actual cash value, to the par or face value of the stock, and that any such mortgage shall be filed and recorded in the office of the Secretary of the Interior as sufficient proof and notice of its legal execution and effectual delivery and of the lien thereby created: Provided, that such successor company, its successors and assigns, shall sell to any applicant therefor for purposes of actual settlement and cultivation in tracts of not less than forty nor more than one hundred and sixty acres each at a price not exceeding two dollars and fifty cents per acre any agricultural land lying more than one mile from said railroad and then unsold heretofore granted by Congress to the Northern Pacific Railroad Company and acquired by purchasers as aforesaid, but this proviso shall not apply to lands chiefly valuable for timber, coal, iron or stone; and said company may reserve to itself, its successors and assigns, in the sale of any lands applied for hereunder [871] merchantable timber and stone not needed for building and fencing thereon, and all coal and iron which may be found thereon, and the right to take therefrom gravel for its own uses: Provided, however, that said company shall have the right to reserve from sale hereunder and to otherwise dispose of such tracts or bodies of arid lands

as it shall deem necessary or advisable for use in any way in promoting and developing irrigation through companies or associations organized under and subject to the laws of the States in which such lands are situated: And provided further, that neither the Northern Pacific Railroad Company nor such successor corporation, its successors or assigns, shall consolidate its stock with or sell, convey or lease said railway, or by other corporate action give control or management over and of the same to any corporation, company, person, or associations of persons owning, operating, or controlling a parallel and competing line of railway; and any contract entered into by said successor company in violation of the provisions hereof shall be null and void, and may be enjoined at the suit of the United States or any state in which said road or any part thereof is situate in any court of competent jurisdiction: And provided also, that nothing herein contained shall be construed as making any additional grant of lands to such successor corporation or as a waiver of any right of the United States now existing to enforce any forfeiture of lands heretofore granted to the said Northern Pacific Railroad Company, or as in any manner affecting the vested rights of any settler or settlers on any of the lands heretofore granted to the Northern Pacific Railroad Company or of any purchaser or

purchasers of any such lands from said company."

The directors and officials of the railway company have been careful to keep alive the charter and franchises of the railroad company and from time to time to elect officers and directors for the railroad company, but such officers and directors so elected are always officers, directors or employees of, and subservient to the railway company and under its dominance and control.

Tenth. Under the 1896 plan the so-called deposit of $10 and $15.00 by railroad stockholders was not authorized or required by the directors or stockholders of the railroad or railway companies or by a Court but was required only by the Syndicate Members and the Managers, and the deposits went solely to the Syndicate Members for their expenses and profits, without any benefit or advantage to the creditors or stockholders of the railroad company or to the railway company or to rehabilitate the railroad company; it was just another scheme to illegally and unlawfully bleed the stockholders of ready cash so the Syndicate Members would not have to put up any cash of the cash they were required to put up under their agreement. [872]

The Managers did not, as J. P. Morgan testified, have to seek members for the Syndicate but men were seeking to obtain the "privilege" of becoming a Syndicate Member. For the syndicate agreement

of March 16, 1896, see JCC Part 5, page 2826, Ex. "M" to the Bill.

No member of the Syndicate ever paid in one cent on the transaction but the Syndicate received and divided among its members $16,814,662.77 as commission and $3,712,752.77 as profits, making a total of $20,527,415.54.

It was further provided in the Syndicate Agreement that the Reorganization Managers should offer to the depositing holders of the old common stock of the Northern Pacific Railroad Company at $15 per share new common stock to the amount of 490,000 shares, being share for share for all the old common stock said to be outstanding. If all this new stock so to be offered to depositing holders of old stock had been taken it would have exhausted $17,619,200 of the new preferred stock and $66,619,200 of the new common stock provided to be sold under Clause I. This would have left to the Syndicate $10,880,900 par of the new common stock at $15 per share without the deposit or surrender of any old stock, and also $1,148,700 of the new preferred stock at $10 per share without the deposit or surrender of any old stock. That is to say, the Syndicate got $10,880,900 of common stock for $1,632,135 and $1,148,700 of preferred stock for $114,870.

The old railroad company common shares deposited with payment of $15 cash per share amounted to 348,528 shares, on which there was

paid the assessment of $15 per share, or $5,227,920
and out of 352,384 outstanding shares of the old railroad company preferred stock there were depositing stockholders to the extent of 336,263 shares who deposited their old stock and paid the assessment of $10 per share, amounting to 3,362,630

making the total of cash paid in by depositing stockholders holding old stock $8,590,550

[873]

This left untaken by the holders of old stock 8,060 shares of new preferred stock and 149,532 shares of new common stock, all of which was likewise delivered to the Syndicate at $10 per share for the allotment on account of unassenting old preferred stock (16,120 shares) ..... $ 161,200
and $15 per share for the allotment on account of unassenting old common stock (141,472 shares) 2,122,080

Total $2,283,280

These additional shares ..... $ 806,000
new preferred stock and 14,953,200

new common stock of the par value of $15,759,200
were also taken by the Syndicate at cost of ..... $ 2,283,280

Thus of the new stock the Syndicate acquired:

Of new preferred stock	$ 1,148,700	for $ 114,870
Of new common stock	10,880,900	for $1,632,135
And additional new preferred stock	806,000)	) for 2,283,280
And new common stock	14,953,200)	
Total new stock	$27,788,800	for $4,030,285

New stock of the par value of	$27,788,800
was acquired by the Syndicate for	4,030,285
or at a sum less than par amounting to	$23,758,515

In the Syndicate contract of March 16, 1896, paragraph 7, it is provided that the new stock is to be offered to the stockholders of the Northern Pacific Company whilst the assessments are to be paid by stockholders of the Northern Pacific Railroad Company. There is nothing in any of the agreements or negotiations to show who or what the Northern Pacific Company was or is. It is one phase of the transaction still secreted and covered up by the officials of [874] the railway company as part of its illegal and unlawful scheme set out herein, and which petitioners after diligent efforts and research have not been able to discover and unravel.

Eleventh. That the entire stock issued by the said Wisconsin corporation, known as the Northern

Pacific Railway Company, is held and possessed by a Voting Trust organized in 1896 and originally composed of J. Pierpont Morgan, George von Siemens, August Belmont, Johnston Livingston and Charles Lanier, who manage said company and elect the directors thereof, and who, as such Voting Trustees, are, and have been, practically in entire control of the property and assets of the Northern Pacific Railroad Company so illegally and unlawfully acquired in the name of the Northern Pacific Railway Company with knowledge of all the facts herein alleged.

That Brayton Ives, August Belmont, George R. Sheldon and Charlemagne Tower, Jr., directors and "Stockholders' Protective Committee" of the said Northern Pacific Railroad Company, have by the means herein recited, thus acquired unto themselves as owning and controlling the said Northern Pacific Railway Company, a transfer of all of the property and assets of the said Northern Pacific Railroad Company, and in consideration of said transfer, and as a part of the price therefor, they did, in the year 1896, cause the said Wisconsin corporation, known as the Northern Pacific Railway Company (formerly the Superior & St. Croix Railroad Company), to issue one hundred and fifty-four millions, nine hundred and ninety-five thousand, seven hundred dollars ($154,995,700) of its capital stock to the said Voting Trustees, who hold the same with full knowledge and notice of all the facts herein averred.

That the said Voting Trustees have issued to certain of the stockholders of the said Northern Pacific Railroad Company voting trust certificates for the majority of the stock so issued by the Wisconsin corporation, the Northern Pacific Railway Company, but [875] that upwards of eighteen millions of dollars of the capital stock of the said Wisconsin corporation, issued as part of the price and consideration for the transfers to it as trustee of the assets and property of the Northern Pacific Railroad Company, remains in the hands of the said Voting Trustees or under their control and if the transfer or exchange of securities was legal and valid, which is denied, that then the said $18,000,000 of said capital stock of the railroad company is the property of the said Northern Pacific Railroad Company for the benefit of its non-assenting stockholders including these petitioners, but that the said Voting Trustees refuse to account for the same to the said railroad company or its non-assenting stockholders, and the said Voting Trustees and the said railway company illegally and unlawfully holding all of the property, assets and securities of the railroad company illegally and unlawfully taken over by them in 1896 refused to account for same and to return same to the said railroad company. (Paragraph 21 of this petition).

Twelfth. The railway company in its first annual report after the so-called 1896 foreclosure or reorganization stated that its stocks and bonds were issued in exchange for the Northern Pacific Rail-

road Company property and that it, in this exchange, obtained title and possession of property worth $21,183,000 more than the par value of its said stocks and bonds so issued in exchange therefor. The report says in part:

> "Upon September 1, 1896, the Northern Pacific Railway Company entered into possession of the Railroad, lands and appurtenant property that had been purchased at foreclosure sales. In exchange for the property thus acquired and unified in the present Northern Pacific system, the Railway Company issued
>
> $155,000,000 of Capital Stock, and
> 129,816,500 of Mortgage Debt
>
> ---
>
> $284,816,500 total issue as of September 1, 1896."

With the bonds and stock thus issued, every dollar of mortgage and other indebtedness of the railroad company was covered, all the reorganization expenses were paid, every assenting stockholder was [876] settled with, all the appropriations stipulated for in the plan were made, and there was still left of this purchase price over Eighteen Millions of the common stock (to say nothing of bonds and preferred stock) which has been appropriated by the syndicate of which the president and directors of the old company were members.

By the agreement of July 13, 1896 between J. P. Morgan & Company, Reorganization Managers, and

the railway company the stocks and bonds of the railway company purport to be issued in consideration of the stocks and bonds of the railroad company.

In the Reorganization Plan of March 16, 1896 it was stipulated that the bonds and stocks of the new company should be issued

> "as a consideration for the property and securities to be conveyed or delivered to the new company or which pursuant to the Plan, the new company shall acquire." (Page 12)

Thirteenth. Referring to Paragraph 44 of the cross bill these petitioners further allege that Section 10 of the Act of July 2, 1864 incorporating the railroad company provides "and no mortgage or construction bond shall ever be issued by the said company on said road or mortgage or lien made in any way except by the consent of the Congress of the United States."

The Joint Resolution of May 31, 1870 provided that the railroad company "is authorized to issue its bonds to aid in the construction and equipment of its road and to secure the same by mortgage on its property," etc. Section 10 was a prohibition and the Joint Resolution was a limited release therefrom and it used words in the singular and it is not necessary to apply them to things in the plural to carry out the intent of the statute as the clear intent of the statute was only to provide for one mortgage sufficient to aid in the construction and

equipment of the road (First National Bank v. Missouri, 263 U. S. 640; 68 L. ed. 486). The extent of the power of the railroad company is to be measured by the terms of the Federal [877] statute relating to the railroad company and they can rightfully exercise only such as are expressly granted or such incidental powers as are necessary to carry on the business which they establish, but an incidental power can avail neither to create powers which expressly or by reasonable implication are withheld nor to enlarge powers given but only to carry into effect those powers which are granted (First National Bank vs. Missouri).

When the mortgage of July 1, 1870 under the above Joint Resolution was executed, experts made estimates for the railroad and for Congress and the mortgage so executed was sufficient to construct and complete the railroad as planned, and as it was constructed and completed, and there was no intention or expectation of another mortgage being necessary or desirable. The Act and the Joint Resolution clearly limit the power of the railroad to one mortgage but where a statute making a grant of property or powers or franchises to a private individual or private corporation becomes the subject of construction as regards the extent of the grant, the universal rule is that in doubtful points the construction shall be against the grantee and in favor of the Government or the general public. Oregon R. & N. Co. vs. Oregonian Ry. Co., 130 U. S. 1, 26;

32 L. ed. 837, 842. Charles River Bridge v. Warren Bridge, 11 Pet. 420; 9 L. ed. 773.

The words "successors and assigns" in Sections 2 and 3 of the Act of 1862 and omitted in Section 7 and other sections and not put in the Joint Resolution of May 31, 1870, are surplusage and do not carry the power to sell or assign or have a foreclosure of the mortgage, certainly without the consent of the United States (Oregon R. & N. Co. vs. Oregonian Ry.).

The execution of the mortgage of July 1, 1870, under the facts alleged and the public record, exhausted the grant under the Joint Resolution for when a charter power (to mortgage) is once exhausted it is in respect to further contracts and rights as though it had [878] never been granted and there could be no further mortgage under that Joint Resolution (E. T. V. & G. Ry. Co. vs. Frazier, 139 U. S. 288; 35 L. ed. 196).

In 1896 the officials of the railway company, practically all of whom were also officials of the railroad company, and the Reorganization Managers, were so doubtful that they could maintain that more than one mortgage was authorized and valid and that any and all of the mortgages in the foreclosure suits were valid, as the Joint Resolution used the words "the mortgage" twice, "said mortgage" once and "such mortgage" once, that they used every effort to prevent the Federal Court in Wisconsin from deciding the question that was squarely presented

to the Court and continued by decrees without being determined and which was never determined. The jurisdiction of the Court likewise never was determined.

There is doubt in the construction of the Joint Resolution of 1870, which doubt must be resolved against the railroad company and in favor of the Government and public, whether or not the Joint Resolution permitted a mortgage on the right of way granted by section 2 of the Act of July 2, 1864.

Petitioners are advised and so charge that the facts and law determined by the Supreme Court in Northern Pacific Railway Co. vs. Townsend, 190 U. S. 267; 47 L. ed. 1044, also resolved the doubt against the grant as authorizing a mortgage on the right of way of the railroad company by finding and stating:

> "Following decisions of this court construing grants of rights of way similar in tenor to the grant now being considered (New Mexico v. United States Trust Co., 172 U. S. 171, 181, 43 L. ed. 407, 410, 19 Sup. Ct. Rep. 128; St. Joseph & Denver C. R. Co. v. Baldwin, 103 U. S. 426; 26 L. ed. 573), it must be held that the fee passed by the grant made in Section 2 of the act of July 2, 1864. But although there was a present grant, it was yet subject to condition expressly stated in the act, and also (to quote the language of the Baldwin Case) 'To those necessarily implied, such as that the road

> shall be * * * used for the purposes designed.' Manifestly, the land forming the right of way was not granted with the intent that it might be absolutely disposed of at the volition of the company. On the contrary, the grant was explicitly stated to be for a designated purpose,—one which [879] negated the existence of the power to voluntarily alienate the right of way or any portion thereof. The substantial consideration inducing the grant was the perpetual use of the land for the legitimate purposes of the railroad, just as though the land had been conveyed in terms to have and to hold the same so long as it was used for the railroad right of way. In effect the grant was of a limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted."

Bonds of the railroad company issued and secured under the mortgage of July 1, 1870 were after the claimed and so-called foreclosure of 1875 carried as "assets" in the railroad company's balance sheet of September 20, 1876 and were carried as "securities owned" and held as muniments of title in the report of June 30, 1898 of the railway company.

The mortgage of 1870 provided for $50,000 for each mile of the 2500 mile line—a total of $125,000,000—of which approximately $30,780,904 were issued.

The inconsistencies and changeableness of the railway company to suit its purposes in carrying out and covering up and secreting the fraud, collusion and false representations of the 1896 fake foreclosure and so-called reorganization is typified in the following letter written on its behalf by a director and general counsel of the railway company :

"Nor. Pac.

7.3% Bonds of 1870. 28 February, 1908

Messrs. Charles Fearon & Co.,
Philadelphia, Pennsylvania.

Dear Sirs:

Mr. George H. Earl, Secretary of the Northern Pacific Railway Company, has handed me your two letters of February 19 and February 25 in this matter.

The mortgage securing the 7.3% bonds of 1870 of the Northern Pacific Railroad Company was foreclosed in 1875. The property of the Company was sold in the foreclosure action, and was acquired by a reorganization committee, and subsequently was vested in the reorganized company, of which the preferred stock was issued to the holders of the 7.3% bonds as provided in the plan of reorganization. As a result of this reorganization, the only interest in the property retained by the holders of the 7.3% bonds was that represented by preferred stock of the reorganized company received by

such bondholders as availed of the reorganization plan. [880]

In 1896, the Northern Pacific Railroad was again sold in foreclosure proceedings, and was purchased at the sale by the present Northern Pacific Railway Company. The proceeds of the sales did not equal the indebtedness, and the equity of the stockholders of the insolvent company was extinguished.

There exists now no fund or property applicable to the payment of the 7.3% bonds of 1870, and the status of a holder of any such bonds at the present time will become apparent to you upon consideration of that fact.

Faithfully yours,
(s) FRANCIS LYNDE STETSON
General Counsel in New York"

Practically all of the 7.3% bonds of 1870, which were turned in under the 1875 proceedings, were deposited, not cancelled, with the Farmers Loan & Trust Company of New York.

Francis Lynde Stetson, general counsel and a director of the railway company on or about December 14, 1903 filed in the Supreme Court of the United States in Northern Securities Company vs. United States a brief on behalf of members of the firm of Morgan & Company who had been "managers" under the reorganization, in which it is stated:

"The Northern Pacific Railway Company was formed in 1896, upon a reorganization of the Northern Pacific Rail Road Company. Its

capital stock consisted of $75,000,000 preferred stock and $80,000,000 common stock, and the charter provided that the preferred stock might be retired at par on any first day of January up to 1917."

Thus ignoring the old Superior and St. Croix Railroad Company's charter and admitting that the railway company was a new organization of some kind or character formed and established in 1896. This is evidenced by the fact that in the mortgages executed during or after 1896 by the railway company they were careful to insert a provision that no recourse upon the mortgages or the bonds issued thereunder shall be had against "any incorporator, stockholder, officer or director" of the corporation or organization executing the mortgage. The so-called mortgages of the railway company during or after 1896 were admittedly not to "aid in the construction and equipment of the road." [881]

The railroad company stock as testified to by Stetson, general counsel and director of the railway company, was not transferred on the books to the railway company until after the null and void act of Wisconsin of April ....., 1897, pretending to authorize the railway company to buy another railroad at a judicial sale; this act was null and void because it was an indirect attempt to amend the charter of the railway company which could not be done by a direct amendment.

Fourteenth. The Morgan Plan and Agreement for Reorganization stipulated that depositors there-

under should "sell and assign" their deposited stock and bonds to J. P. Morgan & Co., Reorganization Managers, who were to exercise all rights of ownership over the same, and who were authorized to proceed to re-organize "with or without foreclosure" it being provided that "for all purposes the property and the securities representing the property might be treated as identical."

The exchange of securities on July 13th, 1896 practically effectuated the re-organization or re-adjustment "without foreclosure"—subject only to the claims of those not assenting.

After the execution of this agreement of July 13th, 1896, and prior to the so-called judicial sale of July 25th, 1896, the officers of the Wisconsin corporation filed in Montana a statement under oath hereinelsewhere set out.

The railway company at the time and afterwards construed the transaction to be merely an exchange of securities or a sale of securities of one company for the securities of the other and without reliance on the so-called fake foreclosure, as the purchase price was the price set out in the reorganization agreement. Francis Lynde Stetson, general counsel for and director of the railway company in 1903 testified:

> "Q. 90 Mr. Stetson, I call your attention to page 13 of the first annual report of the Northern Pacific Railway Company, where it stated that the Northern Pacific Railway Company had issued its capital stock [882] and mortgage

debt or bonds, and had received from Messrs. J. P. Morgan & Company, as reorganization managers,—

	$3,674,913.20	in cash and
	1,325,086.80	in $2,210,000 General Lien Bonds at about 60%
Constituting the	$5,000,000.00	Betterment and Enlargement Fund
	10,500.00	Prior Lien Bonds,
	440,000.00	General Lien Bonds,
	4,086,300.00	Preferred Stock, and
	2,500,000.00	Common Stock.

Were those securities of stocks and bonds part of the consideration which the company had issued for the property and franchises of the federal corporation and which were thus turned back to it by J. P. Morgan & Company?

A. So I assume.

Q. 92 So that part of the price, to the extent there set forth, that the Wisconsin corporation had paid for the property and franchises of the federal corporation to J. P. Morgan & Company, was thus turned back to the Wisconsin corporation by J. P. Morgan & Company?

A. They were thus delivered by J. P. Morgan and Company to the Wisconsin corporation."

He further testified that the securities or some of them so returned were used in the acquisition of the Seattle, Lake Shore and Eastern Railway, which became a part of the Northern Pacific System.

The railway company is estopped to claim that they took title under the foreclosure or that the foreclosure proceedings were valid or passed any title, for the railway company filed itself and had filed for the railroad company an answer in United States vs. Northern Pacific Railway Company, 134 F. 715, in which it is alleged among other things as follows:

> "And these Defendants aver that the said Northern Pacific Railway Company never received any subsidy in land, bonds, or any loan of credit from the United States for the construction of any railroad or telegraph lines; that the said Northern Pacific Railway Company is not engaged in operating its said railroad or telegraph lines under any right or franchise derived from the Government of the United States or from any Act of Congress, but owns, operates and maintains the said line of railroad and telegraph under and by virtue of the laws of the State of Wisconsin, under which it was incorporated and organized, and the laws of the several States in which the lines of railway and telegraph are situate, and so these Defendants say that the said Northern Pacific Railway Company is not subject to the provisions of the said Act of Congress of August 7th, 1868."

In the railway company's answer in the Boyd suit, sworn to June 26, 1907 by George H. Earl,

Secretary, it is alleged that the receivers of the railroad company "took possession of the said railroad franchises and assets of the said railroad company" and it further alleged [883] that there was a valid foreclosure in 1875, and:

> "That its capitalization was increased to $155,000,000 and that duly and lawfully it did obtain, and does now hold, a majority of the outstanding and issued stock of the Northern Pacific Railroad Company, and also substantially all of the franchises, property and assets which were formerly of the Northern Pacific Railroad Company, except as from time to time portions of the land grant have been sold and disposed of."

In December, 1901 the railway company filed an answer in the case of Hackett vs. Northern Pacific Railway Company in the Supreme Court of New York sworn to by George H. Earl, Secretary, in which it stated:

> "In July, 1896 this defendant"—meaning the Superior & St. Croix Railroad that was—"at judicial sale purchased the railroad franchises, immunities and other property of the Northern Pacific Railroad Company, a corporation organized under the laws of the United States, with the consent of the State of Wisconsin, at a time when the respective railroads of this defendant and of the said Northern Pacific Rail-

road Company could be lawfully connected and operated together to constitute one continuous main line."

Fifteenth. Referring to Paragraphs 49 and 50 of the cross bill, these petitioners further allege that the railroad company during all of 1895 and 1896 and for a long time prior thereto was the owner of 3800 shares of the stock of the Superior and St. Croix Railroad Company, the Wisconsin corporation herein called the railway company. The original subscription list of the Superior and St. Croix Railroad Company shows that in November, 1871 H. S. Walbridge, H. D. Walbridge, Walbridge Bros. and Sargent, and John R. Sargent subscribed to the capital stock of the said company for "3800 shares —$380,000," and the certificates were issued in November, 1872. The said Superior and St. Croix Railroad Company reported to the Railroad Commissioner of Wisconsin that on these 3800 shares there had been paid in during the year 1871 the 10% required or $38,000, and in 1872 the payment thereon amounted to $56,560.

On July 29th, 1873 the transfer was made upon the books and new certificates for the 3800 shares were issued to the Northern Pacific Railroad Company, each certificate bearing this endorsement: [884]

"I hereby certify that the within paid up certificate ..... of the Capital Stock of the Superior and St. Croix Railroad Company is entitled to representation and dividends of earn-

ings only to the extent and in the amount that the bonds money labor or other considerations now paid or to be paid for such stock shall be actually applied in the construction of the branch or extension of the Superior & St. Croix R. R. Company or in the procurement of right of way & Depot Grounds. Reference is hereby made to the 'Twelfth Article' of the Agreement made and entered into between said Superior & St. Croix R. R. Co. and the Northern Pacific Railroad Company bearing date the 26th day of June, 1873.

September 4, 1873.

(Signed) HIRAM HAYES,
Secty. Sup. & St. Croix R. R. Co."

That in 1895 Hayes went around and bought up the other 44 shares of the stock of the railway company and delivered them endorsed in blank to Spooner, who was attorney for the railroad company, at Spooner's request.

In an affidavit filed in the case of Mylrea, Attorney General, vs. Superior & St. Croix Railroad, 93 Wisconsin 604; 67 N. W. 1138, by Hiram Hayes, Secretary of the company, and on its behalf, it was stated that the 3800 shares had been subscribed.

The charter of the railway company gave a vote to all "subscribed" stock; stock subscribed and partially paid for, although not delivered, could be voted; in the so-called void amendment of 1895 the right to vote was given to stock "subscribed and outstanding." Francis Lynde Stetson, general coun-

sel and director of the railway company, testified and admitted that the said $56,560 had been paid on the purchase price of this stock prior to July 21, 1873.

These petitioners on information allege that there was no meeting of the stockholders of the railway company after these 3800 shares of stock were transferred to the railroad company until August 31, 1880, on which latter date the railroad company, through its authorized official and general counsel, George A. Gray, voted the stock and elected directors and officials of the railroad company as directors and officials of the railway company, and there was no other meeting of the directors or stockholders of the railway company until October [885] 18, 1895 and there was no meeting of the directors of the company between June 26, 1873 and August 31, 1880.

Prior to February 16, 1882 Hiram Hayes, secretary of the railway company, had been employed as attorney and agent for the railroad company and in the minutes of the railroad company of February 16, 1882 appears this action:

> "The general counsel was authorized to increase the compensation of Colonel Hiram Hayes of Superior City, Wisconsin, as attorney and agent of this company in Wisconsin to Two Hundred Dollars ($200.00) a month commencing on the first day of January last."

At the meeting of the stockholders of the railway company July 1, 1896 the only shares present, being

43, were voted by H. C. Reed (a secretary in the office of John C. Spooner), A. L. Sanborn (a law partner of Spooner), and John C. Spooner, who was an attorney for the railroad company and for the receiver of the railroad company. No notice was given of the meeting to the railroad company, which held and owned the 3800 shares above mentioned of the stock of the railway company nor was it present, nor was any notice given to any of the receivers, nor were they present.

The same was true as to the meeting of the stockholders of the railway company on October 18, 1895. There being no meeting of the stockholders and directors of the railway company between August 31, 1880 and October 18, 1895, there was no authority for the application claimed to have been made by Hiram Hayes for the so-called void amendment of the charter of the railway company of April 19, 1895, which was sought to be confirmed at the illegal meeting held October 18, 1895, as Hiram Hayes did not prepare it nor have knowledge of its preparation and did not see it until after its enactment and it was prepared by John C. Spooner.

Hayes testified in a suit in which the railway company was a party that he was secretary of the Superior & St. Croix Railway Co. until February ....., 1895. On May 4, 1895 he gave the order for the [886] delivery to Spooner by the bank of the 3800 shares of stock of the railway company owned by the railroad company "for transmission to me," which was after the time that he testified he was secretary of the railway company. Hayes further

testified that Spooner was not "acting as the attorney" of the Superior & St. Croix Railway Company in the matter of withdrawing the 3800 shares of stock of the railway company from the First National Bank of Madison, Wisconsin in 1895, which was the property of the railroad company.

Sometime in 1895 before August, Spooner wrote a report for someone on the Superior & St. Croix Railroad Company, in which he stated:

> "I ought to add, although out of its order, that February 3, 1872, an annual meeting of stockholders was held, and the meeting adjourned without electing directors. The next meeting of stockholders was held August 31, 1880, at Superior. Col. George Gray was appointed chairman and Hiram Hayes, secretary. This meeting was duly called. The stockholders proceeded to the election of nine directors. Gates, Morrison and Bardon were chosen inspectors, and the election was had by ballot; 3,812 shares of stock were voted, and the following board was elected, each receiving 3,812 votes except Hiram Hayes, who was evidently too modest to vote for himself; Frederick Billings, Charles B. Wright, Johnston Livingston, George Gray, H. E. Sargent, Irvin W. Gates, Hiram Hayes, H. W. Shaw and James Bardon. Thereupon the meeting adjourned.
>
> "It is evident that the 3800 shares voted at this meeting, notwithstanding they had not been earned, and were not the property of the

Northern Pacific Railroad Co. and contained on the back a provision that they did not entitle the holder to representation. The 12 shares voted in addition were, however, valid shares."

But, if 44 shares were the only valid outstanding or subscribed shares, still 12 shares did not constitute a quorum under the charter.

Petitioners are informed, believe and so charge that as part of the fraudulent unlawful schemes in this petition alleged the railway company and the Reorganization Managers had Hiram Hayes write a letter full of false statements as follows:

"Madison, Wisconsin, Feby. 14, 1895

First National Bank,
Madison, Wis.,

Gentlemen:

As Secretary of the Superior & St. Croix Railroad Company, I have to request that you will deliver to me the 3800 shares of stock numbered as follows: certificates numbered 20, 21, 22, 23, 24 and 25 for 500 shares each, and certificate No. 26 for 800 shares of the capital [887] stock of the Superior & St. Croix Railroad Company, delivered to you on the 6th day of September, 1873, to be held in escrow under agreement, a copy of which is in your hands, between the Superior & St. Croix Railroad Company, the Northern Pacific Railroad Company, Walbridge Brothers and Sargent, and the County of Douglas.

This stock you will see was to be delivered to the Northern Pacific, together with the bonds of Douglas County, which were deposited with you upon the terms provided in the agreement. You will recollect that suit was afterwards brought by Douglas County to cancel its subscription to the capital stock, to secure a return of the bonds, and to have declared void the agreement. The Northern Pacific was made a party, also the Superior & St. Croix Railroad Company, and all others interested. The case went to the Supreme Court of the State of Wisconsin, which held the agreement void in all its parts, and decreed a surrender of the bonds. See case reported in 38 Wis. 179.

The bonds were delivered by you to the Clerk of the Court, and they were cancelled. The stock which was to be part payment for the road under the agreement, also ceased to be capable of being earned by the Northern Pacific. It never built a mile of road under the agreement, and has no claim whatever to or ownership in the stock. The Company owns no property, railroad or otherwise. There could be no better evidence of the fact that there is no vested ownership of or interest in this stock than that the matter has remained quiescent, without an inquiry even, for over twenty years. Indeed it was in oblivion in the old archives of the bank, and the fact that the bank had ever received it had been forgotten by its officers,

and after a copy of the bank's receipt for it was exhibited, it was insisted by the officers that it was not in its custody. It has been, except by the Company whose capital it is, utterly abandoned. It has never been paid for in any way. It was to be paid for by a railroad which has never been constructed under the agreement. There is no claim of pretence to the contrary, and never can be, for the agreement itself was held void. No other contract ever was made, and the agreement under which this stock is held by you is that which was held to be void in all its parts.

I am picking up, as Secretary of the Company, the outstanding stock for cancellation. You will remember that the Northern Pacific was a party to the litigation and bound by the decision, which was by the Supreme Court, and therefore final.

I will arrange for the payment to you of the One Hundred Dollars for the keeping of the stock, and have executed, and enclose herewith, a receipt for the stock.

Yours very truly,

HIRAM HAYES,

Secretary, Superior & St. Croix R. R. Co."

J. H. Sargent and Horace S. Walbridge of the firm of Walbridge Bros. and Sargent, were directors of the railway company in 1871 and on December 20, 1871 H. S. Walbridge was elected president of the railway company. [888]

Sixteenth. The railroad company under its charter and the laws of Congress had no authority to and could not lease or convey or by any other contract turn over its entire road and property to another corporation nor could it lease or convey or by any other contract turn over its road and property in the State of Oregon unless it was specifically authorized by the statute creating it to do so; nor could the railway company receive the property of the railroad company by any of the means above mentioned in the State of Oregon under the law and facts determined in Oregon Railway and Navigation Company vs. Oregonian Railway Company, 130 U. S. 1; 32 L. ed. 837 (1888), quoting Thomas vs. West Jersey Railroad, 101 U. S. 71; 25 L. ed. 950; Pennsylvania R. Co. vs. St. Louis, etc. Co., 118 U. S. 290, 309; 30 L. Ed. 83, 92, and many English and American cases.

This decision prohibited the exchange of stock or so-called reorganization or void foreclosure of 1896 of the railroad company not only in the State of Oregon but also in the States of Wisconsin, Minnesota, Montana, Idaho and Washington. The Oregonian Railway Company was organized under the laws of Scotland and the Oregon Railway & Navigation Company under the laws of the State of Oregon. In Oregon Railway & Navigation Company vs. Oregonian Railway Company it was contended that leases and acts ultra vires of the charter and statute could not be attacked by the railroad companies but would have to be by the state, which contention

was not sustained but overruled. The Supreme Court in Thomas vs. West Jersey Railroad Company above found and stated:

> "That principle is, that where a corporation like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions which undertakes, without the consent of the State, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the State, and is void as against public policy. This doctrine is asserted with remarkable clearness in the opinion of this court, delivered by Mr. Justice Campbell, in the case of R. R. Co. v. Winans, [889] 17 How. 30, 15 L. ed. 27. The corporation in that case was chartered to build and maintain a railroad in Pennsylvania by the Legislature of that State. The stock in it was taken by a Maryland corporation, called the Baltimore and Susquehanna Railroad Company, and the entire management of the road was committed to the Maryland company, which appointed all the officers and agents upon it, and furnished the rolling stock. In reference to this state of things and its effect upon the liability of the

Pennsylvania corporation for infringing a patent of the defendant in error, Winans, this court said: 'This conclusion (argument) implies that the duties imposed upon plaintiff (in error) by the charter are fulfilled by the construction of the road, and that by alienating its right to use, and its powers of control and supervision, it may avoid further responsibility. But these acts involve an overturn of the relations which the charter has arranged between the Legislature and the community. Important franchises were conferred upon the corporation to enable it to provide facilities for communication and intercourse, required for public convenience. Corporate management and control over these were prescribed, and corporate responsibility for their insufficiency provided as a remuneration for their grant. The corporation cannot absolve itself from the performance of its obligation without the consent of the Legislature. Seman v. Rufford, 1 Sim. (N. S.) 550; Winch v. R. Co., 13 L. & Eq. 506.'

"And in the case of Black v. Canal Co., 7 C. E. Green, 130 (22 N. J. Eq. 130), Chancellor Zabriskie says: 'It may be considered as settled that a corporation cannot lease or alienate any franchise or any property necessary to perform its obligations and duties to the State, without legislative authority.' For this he cites some ten or twelve decided cases in England and in this country."

In Osborn v. United States Bank, 9 Wheat. 738, 823, the Court found and determined:

> "The charter of incorporation not only creates it, but gives it every faculty which it possesses. The power to acquire rights of any description, to transact business of any description, to make contracts of any description, to sue on those contracts, is given and measured by its charter, and that charter is a law of the United States. This being can acquire no right, make no contract, bring no suit, which is not authorized by a law of the United States. It is not itself the mere creature of a law, but all its actions and all its rights are dependent on the same law."

In California v. Central Pacific R. Co., 127 U. S. 1 at 40; 32 L. ed. 150 at 157 (cited and quoted in Paragraph 55 of the cross bill) the Court found and determined:

> "Generalized and devested of the special form which it assumes under a monarchical government based on feudal traditions, a franchise is a right, privilege or power of public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration, either by the government directly or by public agents acting under such conditions and regulations as the government may impose in the public interest and for the

> public security. Such rights and powers must exist under every form of society. They are always educed by the laws and customs of the community. Under our system, their existence and disposal are under the control of the legislative department of the government, and they cannot [890] be assumed or exercised without legislative authority. No private person can establish a public highway, or a public ferry or railroad, or charge tolls for the use of the same, without authority from the Legislature, direct or derived. These are franchises. No private person can take another's property, even for a public use, without such authority; which is the same as to say that the right of eminent domain can only be exercised by virtue of a legislative grant. This is a franchise. No persons can make themselves a body corporate and politic without legislative authority. Corporate capacity is a franchise. The list might be continued indefinitely."

Neither the railroad company nor its property or stock could be taken, received or held by the railway company without the consent of the United States, even if the railway company had authority to so take, hold and receive it, which latter authority is denied.

The title to this railroad, telegraph line and land grant is now claimed by the Northern Pacific Railway Company, a Wisconsin corporation, incorpo-

rated in 1870 under the name of the Superior and St. Croix Railroad Company to build a local line of railroad in Wisconsin.

Under the Wisconsin law and decisions railroad corporations chartered in that State are deemed strictly private and local corporations, formed for purposes of private gain.

The distinction between such Wisconsin corporations and the Northern Pacific Railroad Company and the facts both are determined and found by the Court in Roberts vs. Northern Pacific R. R. Co., 158 U. S. 1; 39 L. ed. 873 (April 22, 1895), where, after quoting from the Congressional Charter Act of 1864 as to the declared public purposes for which the latter corporation had been created, the U. S. Supreme Court said:

> "It is obvious that the effect of this legislation of Congress was to grant the power to construct and maintain a public highway for the use of the people of the United States, and subject, in important respects, to the control of Congress. That portion of its road that lies within the State of Wisconsin is of the same public character as the portions lying in other States or Territories. Whatever respect may be due to decisions of the Courts of Wisconsin defining the character and powers of Wisconsin corporations owning railroads, the scope of those decisions cannot be deemed to include the case of a national highway like that of the Northern Pacific Railroad Company. All of the

great transcontinental railroads were constructed, under Federal authority, through Territories which have since become States. Such States are possessed of the same powers of sovereignty as belong to the older States. Hence, if the contention were true that the State of Wisconsin, through its judiciary, can deprive that portion of the railroad within its borders [891] to its national character, and declare the Northern Pacific Railroad Company to be a private corporation not engaged in promoting a public purpose, the same would be true of the other States through which the road passes. Such a contention, we think, cannot be successfully maintained. * * * We think, therefore, that when the Circuit Court of the United States for the District of Wisconsin was called upon, in the present case, to pass upon the character, powers and rights of the Northern Pacific Railroad Company, it was bound to regard that company as a corporation of the United States created for national purposes, and as a means of interstate commerce and not to apply to it the views of the Wisconsin Courts pertaining to their local railroads.

"Upon the principle of these cases it is obvious that the state of Wisconsin at least after it had given its consent to the Northern Pacific Railroad Company to enter into its territory and construct its road, and such consent had been acted on, could not by hostile legislation,

hamper and restrict that company in the management and control of its railroad, nor by judicial decisions of its courts transform a corporation formed by national legislation for national purposes and interstate commerce into one of local character, with rights and powers restricted by views of policy applicable to state organizations."

John C. Spooner was attorney for the railroad company in this case.

There was no authority in the Act of Congress of 1864 for the transfer of the properties or the stock of the railroad company as it was transferred and juggled in 1896 nor was there any authority in the Act of Wisconsin for the railroad company to take and receive same. The invalid and illegal amendment of the charter of the railway company of April 15, 1895 did not empower or authorize the railway company to take or receive same (as alleged hereinelsewhere this amendment was approximately six months before there was any authority for the amendment to be sought or obtained), as there was no meeting of the railway company from August 31, 1880 until October 10, 1895, which latter meeting was illegal and void.

In Case vs. Kelly, 133 U. S. 21; 33 L. ed. 513, the Supreme Court found and determined that a Wisconsin railroad corporation had no authority under the laws of that State to receive an indefinite quantity of lands whether by purchase or by gift

for use in the construction with no limitation upon their use or upon their sale, but that such railroad company is limited to the lands necessary to such use as are appropriate to the operation of its railroad, being its right of way, terminals and stations.

The laws construed in Case vs. Kelly were the same ones in effect in 1896 and the Court stated: [892]

> "It is not pretended that there is any general statute of the State of Wisconsin which authorizes either this Company or any other corporation to purchase and hold lands indefinitely, as an individual could do, without regard to the uses to be made of such real estate. The charter of the Company, approved April 12, 1866, chapter 540, authorizes it to acquire real estate, namely, the fee simple in lands, tenements and easements, for their legitimate use for railroad purposes. It is thus authorized to take lands 100 feet in width for right of way, and also such as is needed for depot buildings, stopping stages, station houses, freight-houses, warehouses, engine-houses, machine-shops, factories and for purposes connected with the use and management of the railroad. This enumeration of the purposes for which the corporation could acquire title to real estate must necessarily be held exclusive of all other purposes, and as the court said at the time of making its interlocutory decree, 'it was not authorized by its char-

ter to take lands for speculative or farming purposes.'

"It must be held, therefore, that there was no authority under the laws of Wisconsin for this corporation to receive an indefinite quantity of lands, whether by purchase or gift, to be converted into money or held for any other purpose than those mentioned in its Act of incorporation."

It is contended in this case that the court could not decide the question but it would have to be raised by a writ of quo warranto, but the Court held and said:

"It has no authority by the Statute to receive such title and to own such lands, and the question here is, not whether the courts would deprive it of such lands if they had been conveyed to it, but whether they will aid it to violate the law and obtain a title which it has no power to hold. We think the questions are very different ones, and that while a court might hesitate to declare the title to lands received already, and in the possession and ownership of the Company, void on the principle that they had no authority to take such lands, it is very clear that it will not make itself the active agent in behalf of the Company in violating the law, and enabling the Company to do that which the law forbids."

The Court held that it would assist in taking away from the railroad company rights and property already obtained by ultra vires acts in the Oregon Railway & Navigation case above. In the suit at bar the railway company is not only seeking to retain lands to which it claims to have obtained the title from the railroad company, but is also seeking other lands or the value of same, in which the title is still in the United States and has not passed to either the railroad company or the railway company and title to which the railway company cannot receive, take or hold under the laws of Wisconsin, Minnesota and the other states traversed by the Northern Pacific Railroad Company system. [893]

The Reorganization Managers, Syndicate Members, officials and directors of the railroad and railway companies and others associated with them in their schemes and plans known as the Reorganization Proceedings and fake foreclosure of 1896, which were conducted for their own personal profit, benefit and aggrandizement, having difficulty with the titles and being advised of the defects and lack of legislative authority in the said proceedings, sought and secured the Act of 1897 of the Legislature of Wisconsin (see Digest of Wisconsin Statutes, Vol. 1, page 1352), which act in effect was and was intended to be an amendment of the charter of the railway company and an increase of its powers and rights and to apply only to the railway company. It was and is absolutely null and void and in

contravention of the Constitution of Wisconsin and in contravention of the principles declared binding on the railroad corporation in Roberts vs. Northern Pacific Railroad Company, 158 U. S. 1; 39 L. ed. 873 quoted above in this paragraph. The said act is as follows:

> "Any such railroad corporation may give or take, lease or sell or purchase from any railroad company or at any judicial sale, within or without the state, and give or take a conveyance or assignment of the railroad, franchises, immunities, together with the appurtenances and all other property and the stock or bonds or both thereof of any other railroad corporation, whether organized or created by the laws of this State or of any other state or of the United States, or any portion thereof, within or without this state when their respective railroads can be lawfully connected and operated together to constitute one continuous main line, or when the road so purchased will constitute branches or feeders of any railroad maintained and operated by such purchasing corporation or when the road so purchased is one which any such company is authorized by its charter to build, maintain and operate; and may purchase and hold the stock or bonds of any railway company to which it has furnished the money for the construction of its railway, or purchase for the money so furnished or for such other consideration as may

be agreed upon between the companies, by their respective boards of directors, and take a conveyance of the whole or any portion of the franchises of said corporation and of the railway property and appurtenances thereof, and all acts, purchases, whether at judicial sale or otherwise, and all conveyances heretofore made by any railway company organized under the laws of this state which are authorized by this section and all conditions and agreements upon which the stocks of any such corporation have been and are to be issued, relating to voting power, dividends and trustees, between different classes of stock or otherwise, are hereby legalized, ratified and confirmed; provided, that nothing herein contained shall be construed to legalize any contract or indenture of lease heretofore entered into between a corporation of this state and any corporation organized or created by the laws of the United States. But no railroad corporation shall [894] consolidate with, or lease or purchase, or in any way become owner of or control any other railroad corporation or any stock, franchises, rights or property thereof, which owns or controls a parallel and competing line, to be determined by jury."

In 1896 there was a provision in the Wisconsin statutes providing that:

"No railroad corporation shall consolidate with or lease or purchase or in any way be-

come owner of or control any other railroad corporation or any stock, franchises, rights or property thereof which owns or controls a parallel and competing line."

On July 1, 1896 the railway company did not own or was not operating any railroad but between July 1st and its reorganization agreement of July 13, 1896 and the foreclosure on July 25, 1896 the railway built the three mile line described below from the Minnesota State line east into and through the town of Walbridge, which was parallel to the railroad's track and on the land of the railroad. The Act of April 18, 1899 providing that any railroad corporation with the approval of the majority of the shares of its capital stock may purchase at judicial sale the property, franchises, etc. of any insolvent railroad corporation contains this altered proviso:

"provided that the railroad so purchased shall not be parallel or competing with any constructed railroad owned or controlled and operated by the purchasing corporation, and shall be a continuation of, or be connected with, or intersected by, a line of railroad owned, leased or operated by such purchasing corporation, or which it shall be authorized to build."

Petitioners are advised by Wisconsin attorneys and so charge that the Wisconsin Acts of 1897 and 1899 are invalid and void as contrary to the Wis-

consin Constitution, Article 4, Section 18, which forbids any act containing two subjects. The so-called reorganization and fake foreclosure of 1896 was invalid and void as to the railroad property and stock securities in the State of Minnesota, and the railway company and railroad company are estopped to deny such invalidity thereof by Pearsall v. Great Northern Railway Company, 161 U. S. 646; 40 L. ed. 383, where the Court found and determined:

> "This was a bill in equity filed by Pearsall, a stockholder in the Great Northern Railway, against the company, which is a corporation created and existing under the laws of the territory and state of Minnesota, and a citizen of that state, to enjoin it from entering [895] into and carrying out a certain agreement between that company and the holders of bonds secured by the second and third general mortgages, and the consolidated mortgage of the Northern Pacific Railroad Company, under which, upon a sale and foreclosure of the mortgages given to secure such bonds, the holders were to purchase or cause to be purchased, the property and franchises of the Northern Pacific Railroad Company."

The Court held that an arrangement by which a railroad company in return for a guaranty, turns over to a trustee for the entire body of stockholders of another company owning a parallel road one-half of its stock, with an agreement contemplating

an interchange of traffic and the use of terminal facilities, and with the almost certainty that the complete control of the former will be obtained by the latter company—is in violation of a law prohibiting railroad corporations from consolidating with, leasing, or purchasing, or in any other way becoming the owner of or controlling, a parallel or competing line.

The amended Wisconsin Constitution of 1871 provides:

> "The Legislature is prohibited from enacting any special or private laws in the following cases:
>
> * * * * * * *
>
> 7th. For granting corporate powers or privileges except for cities."

This Constitution doesn't just prohibit amendment of charters but prohibits all "special or private" "corporate powers or privileges" using the word "or" twice, thus disjoining "special" and "private" and also "powers" and "privileges." Authority to increase the railway company stock from $5,000,000 to $155,000,000 was a "corporate power" granted and not just a "privilege" as Chicago City Ry. Co. vs. Atherton, 18 Wall. 233; 21 L. ed 902 determined that an increase of capital is "organic and fundamental."

Seventeenth. At a meeting of the directors of the railway company June 5, 1873, there was some change in the location of the line along the Bay of Superior to Connor's Point.

On the cancellation of the agreement between Walbridge Bros. & Co. and the railway company on June 26, 1873 the railway company and the railroad company entered into an agreement whereby the railroad [896] company was to build the proposed railroad for the railway company on the line located at the meeting of the board of directors June 5, 1873 from the Bay of Superior to the point of connection with the Northern Pacific Railroad in the County of Carlton, State of Minnesota, which was Thompson's Junction.

Just when the railroad company began work on this and how much they did, these petitioners are not informed sufficiently to allege but the report of the railway company for the year ending December 31, 1873 reported:

"Length of main line from Superior to State line of Wisconsin and Minnesota	15 3/5 miles
From state line to Northern Pacific Railroad Junction in Minnesota	9 miles
Total	24 3/5 miles"

and the same amount was reported for the year ending December 13, 1874.

The railroad company having become the owner of 3800 shares of the stock of the railway company in 1873, the remaining 44 shares were, as these petitioners are informed and charge, mostly owned by officers or directors of the railroad company.

In 1880 the railroad company voted the said 3800 shares of stock of the railway company and shortly thereafter built or completed the railroad from Thompson's Junction to Superior and to Connor's Point as covenanted for June 26, 1873 along the identical line located by the railway company.

In the early eighties the Northern Pacific built or completed the road of the Superior & St. Croix Company and adopted such road as part of its own main line and from that time the Superior & St. Croix ceased to keep up any separate corporate existence.

The following is the announcement made in the local paper in Superior, Wisconsin at the time this building was being arranged for:

(From the "Superior Times" of Saturday, September 4, 1880)

"RE-ORGANIZATION OF THE SUPERIOR & ST. CROIX RAIL ROAD COMPANY

This company was re-organized on Tuesday last by the election of the following directors and officers: [897]

Frederick Billings, President,
Irvin W. Gates, Vice-President,
Hiram Hayes, Secretary and Treasurer,
Charles B. Wright, Johnston Livingston, George Gray, H. E. Sergeant, James Bardon and H. W. Shaw,—Directors.

The Company has a special charter to build a line from Superior to the St. Croix, with a

branch from Superior westward to the State line. It was on this branch that Mr. Walbridge partially constructed the line from Superior towards the Northern Pacific Junction in 1872. The Charter passed virtually into the control of the Northern Pacific Company in 1873, just before the panic.

The recent re-organization was made, we believe, with the view that the charter would be of assistance to the Northern Pacific in getting connections with its main line when it extends eastward through Wisconsin. Colonel Gray, the Attorney of the Northern Pacific, was present at the meeting."

James Bardon, one of the directors above named of the railway company and who was the publisher of the Times, personally at Superior in 1902 verified the truthfulness of the statement set forth in the above announcement.

Charles B. Wright mentioned above as a director of the railway company, was for many years president and director (director from 1870, vice president from 1873, president from 1874 to 1879) of the railroad company about the same time and refused to turn in his 500 shares of preferred and 100 shares of common stock of the railroad company in 1896 or to assent to the reorganization and proceedings of 1896 for the reason, as he stated, that being familiar with the early history of both roads and all the transactions of the railroad, the stock

would continue to have value and land value, of which the so-called reorganization and fake foreclosure could not divest it, and he requested his heirs and administrators to hold the stock and not sell it for the same reason, as these petitioners are informed, believe and so charge.

The Wisconsin Special Statute of March 25, 1872, chapter 139, referring and applying to the Northern Pacific Railroad Company and the Federal Charter of the latter company, authorized this consolidation to be made, it aiding in the construction of the main line of railroad contemplated by Congress. Section 2 of this act is as follows: [898]

> "Section 2. A purchase by the Northern Pacific Railroad Company of, or the consolidation of its line with any other railroad whose line shall conform to the route above prescribed, shall, for the purposes of this act, be deemed equivalent to a construction by said Northern Pacific Railroad Company of its said railroad, for such distance as the road so purchased or consolidated with shall be constructed on said route."

The 24 3/5 miles location of the railway company complied with the above route.

The decision in Williams vs. Southern New Jersey R. R. Co., 26 N. J. Equity, 398, is ample authority that the conduct of the parties here was sufficient to work a consolidation even though no formal agreement of consolidation was recorded with the

State authorities. Cox vs. Midland Railroad Company, 31 N. J. Equity 105, held a railroad company may lose its location by allowing another railroad to use and occupy the land included in such location.

Prior to January, 1873 the State of Wisconsin brought a suit against the railroad company to prevent the road from cutting out Superior and making its main line to Duluth, which suit was settled or compromised in an agreement between the railroad company and Governor Washburn of Wisconsin in 1873, and in Volume 1, page 363 of the director's records of a meeting of the board of directors of February 13, 1873 the following is found:

> "President Cass stated to the board the arrangement which he had made under the instruction of the executive committee with Governor Washburn, of Wisconsin, for the settlement of the suit brought by that State to remove the dyke from Superior Bay. It is contained in the following letter which was read to the board,—
>
> 'New York, January 28, 1873
>
> Hon. C. C. Washburn,
> Governor of Wisconsin.
>
> Dear Sir:
>
> The Northern Pacific Railroad Company will agree to build a branch from the main line of the Lake Superior and Mississippi Railroad, from Duluth across Rice's Point and Con-

nor's Point and along the shore of the Bay of Superior to the Nemadji river—the line to be located with a view to economy of construction and connecting with wharves and docks in said Bay, with such necessary station houses as may be needful for the business of the town of Superior—the road to be completed within eight months from the day when a deed shall be delivered to this Company for the right of way, and all station grounds and wharf frontage needed for the present and future business of the Northern [899] Pacific Railroad. The right of way herein mentioned is, from Connor's Point to the Nemadji River, including the right to construct a bridge across the channel between Connor's and Rice's Points.

In conducting the business of the road the Northern Pacific Railroad agrees to place Duluth and Superior on such equal footing, as will leave the commercial world to elect for itself where it will do business, without any discrimination in favor of either place, delivering passengers and freight both at Superior and Duluth.

And the railroad further agrees to erect grain elevators in Superior or permit private parties to do so; and if private parties shall so erect elevators on the line of the railroad, the Company agrees to deliver to the elevators all the grain which may be consigned to them.

G. W. CASS,

President, &c.' "

After this adjustment Douglas County donated certain lands to the railroad company for the construction of the 24 3/5 miles that it constructed from Thompson's Junction to Superior, Connor's Point and Rice's Point (see Act of Congress February 27, 1873, 17 Stats., 77). The section from Superior City to the Minnesota State line cost upwards of $500,000 and the Connor's Point branch cost upwards of $90,000. The item in the consolidated balance sheet of the railroad company filed by the receivers showing the condition of the trust estate October 31, 1893 was "Sundry branch roads and surveys $263,441.05" included the railroad built by the railroad company under the contract with the railway company on the line located by the railway company from Thompson's Junction to Superior and Connor's Point.

A public meeting was held in the Court House at Superior in October, 1880, which was called to order by James Bardon, one of the directors of the railway company, at which H. W. Shaw was chosen chairman, and Hiram Hayes, secretary of the railway company and an attorney and agent of the railway company, I. W. Gates, a director and stockholder of the railway company, James Seyer and other officials of the railway and railroad companies made speeches, after which the following resolution was passed:

> "Resolved that we learn with great satisfaction of the efforts being made by the non-resident owners to secure a railroad for Superior,

and that their action has our cordial approval, and that we promise them our hearty co-operation in their efforts looking to the [900] end in view. Resolved, that we desire and are anxious to see the railroad line extended from the Nemadji River up along or near the westerly shore of the Bay of Superior to the northerly end of Connors Point on the line located by the Superior & St. Croix Company in 1873 and afterwards adopted by the Northern Pacific Company, and that owners of property to be directly benefited by such extension should be solicited at once for contributions to encourage the construction of same."

Hiram Hayes, secretary of the railway company, made an affidavit in the case of Mylrea, Attorney General v. Superior & St. Croix Railroad Company in part as follows: "That on or about the month of May, 1872 the said Walbridge Brothers and Sargent failed and stopped work on the construction of the proposed railroad, discharged their men and never afterwards resumed work" on their contract with the railway company, and the affidavit shows that they had not built any road for the railway company. The annual report of the railway company for the year ending December 31, 1872 did not report any road built or operated.

The railway company officials, or rather the inside officials, knew that the 24 3/5 miles from Thompson's Junction to Superior and Connor's

Point was built by the railroad company on the identical line or route located by the railway company, being the line or route on which the railroad company was to build the road for the railway company, but in 1896 they secreted or hid and prevented and have ever since prevented these petitioners and all others from seeing the records of the railroad company and the railway company on this matter, and having hidden, secreted and kept covered up the said records in 1896 the said railway company in July built 3 miles east from the Minnesota State line through Walbridge parallel to and on the north of the line built by the railroad company in 1880 from Thompson's Junction to Superior and crossed it to the south of Walbridge. This line was 150 feet from the center of the roadbed of the line the railroad built in 1880 or 1881 and the right of way of same was 100 or 200 feet on either side. This three mile stretch was built by the inside group of the railway company and railroad company in 1896 for the purpose of trying to make their illegal and unlawful reorganization and fake foreclosure valid and legal. [901]

In taking the depositions in the Hoover case in 1903 Francis Lynde Stetson, director and general counsel for the railway company, conceded for the purposes of that case, that the line of the railroad built by the railroad company under agreement with the supervisor of Douglas County was built by the Northern Pacific Railroad Company upon the lines located in 1871 and 1873 by the Superior and St. Croix Railroad Company.

At a later date after Engineer W. L. Darling had testified that he was unable to say that the road so built by the railroad company in 1880 was not the identical line located by the railway company in 1871 and 1873, Mr. Bunn, attorney for the railway withdrew the concession, but this was before Mr. I. S. P. Weeks, another engineer for the railroad and railway companies, testified that his recollection was that the route built by the railroad in 1880 and 1881 was the line located by the railway company in 1871 and 1873, and he remembered when they were building the road that it was right on the openings that had been cut some years previous thereto, which was the location of the line of the railway company.

The line built by the railroad company from Thompson's Junction to Superior and another piece built by the railroad to and along Connor's Point were both on the road or line located by the Superior & St. Croix Company, and these petitioners are informed, believe and charge that the lines so built from Thompson's Junction to Superior and Connor's Point on the line located by the railway company and covered by the contract between the railroad and railway companies was in May, 1882, by action of the board of directors of the railroad company, adopted as part of the main line of the railroad company.

When the suit of Douglas County vs. Superior & St. Croix Railroad Company (the railway company) and the railroad company, 38 Wisc. 179, to

cancel the county bonds, which were issued without statutory authority, was filed and service by publication was had as to the railroad, Hiram Hayes, who was secretary of the railway company and [902] attorney and agent for the railroad company brought the suit to the attention of President Cass of the railroad company and seemingly recommended a defense, but President Cass and the railroad company refrained from in any way appearing or taking part in the suit because, as petitioners are advised, believe and charge, the railroad company had entered into an arrangement or agreement with Douglas County whereby the county was to donate and convey to the railroad company lands of the county and which were actually donated by the county to the railroad in lieu of or to take the place in whole or in part of the void Douglas County bonds, which bonds the Court afterwards declared void and cancelled.

There was no order or decree in this suit cancelling or voiding the 3800 shares of stock owned and held by the railroad company in the railway company, but while the bonds were declared void, yet in the suit by consent certain bonds and other remunerations were allowed to Walbridge Brothers and Sargent, but as far as the record shows the 3800 shares of stock of the railroad company were left the property of the railroad company.

Johnston Livingston, who was a stockholder and director in the railroad company in 1880 and 1881 and, as petitioners are informed, a director of the

railway company about that time and until 1896, testified in 1903 that he did not know that the Superior & St. Croix Railroad Company was the Northern Pacific Railway Company in 1896 that became a party to the reorganization.

Because of and in view of the apparent ownership of the railway company by the railroad company in 1873 and all times thereafter and the building by the railroad of 24 3/5 miles from Thompson's Junction to Superior and Connor's Point on the identical line located by the railway company in 1871 and 1873, along which the railroad company was to build the railroad for the railway company, and the absorption of the railway company by the railroad company as hereinbefore in this paragraph set out, a paragraph was put in the Voting Trust Agreement of December 1, 1896, which provided: [903]

> "The term Northern Pacific Railway Company for the purposes of this agreement and for all rights thereunder including the issue and delivery of stock shall be taken to mean either the Wisconsin corporation of that name created by Chapter 326 of the Private and Local Laws of Wisconsin, passed 1870, and the Acts supplemented thereto, or any successor or consolidated or other railroad corporation, which with the unanimous approval of the voting trustees, shall be adopted to own or operate the railroad properties acquired under the said reorganization plan and agreement dated March 16, 1896 and to carry said agreement into fuller effect."

These petitioners are informed, advised and charge that the officials and directors of the railroad and railway companies and other parties to the reorganization and the fake foreclosure of 1896, as various of them stated at the time, felt that the said so-called reorganization and fake foreclosure was or would be held and treated by the Courts as well as the United States to be invalid and void and that no title or right of possession to any of the land, property, stocks, assets, securities or bonds had passed from the railroad company and this voting trust was organized and the above paragraph inserted in it to enable the trustees under the voting trust to resume the conduct of the property under the name and charter of the railroad company without any further proceedings whatever; this Court can now and it is its duty to declare and decree that title to and right to possession of all the lands, properties, franchises, assets, stocks, bonds and securities of the railroad company unlawfully taken into custody and possession, as hereinbefore alleged, by the railway company and the voting trustees, was in 1896 and has been at all times and still is in the railroad company.

Although the railway attorneys filed an answer for the railroad company disclaiming any interest, yet it has put evidence in the record in this cause showing so many of the illegalities and wrongs committed in 1896 that the Court cannot make a true, just, equitable and complete decision and decree

without determining most, if not all, of the very questions raised in this petition and the cross bill. The railway company having thus presented the matter, such determination is mandatorily required by the statute of June 25, 1929. [904]

This statute provides a special and specific remedy for all the parties named in the suit and in these petitioners and any others coming under the terms of the statute to determine all questions and issues named in the statute free of any and all defense of laches, multifariousness or quo warranto, a proper remedy, as well as any technical defense.

In 1896 the officials of the railroad and railway company and the Reorganization Managers and members of the Syndicate believed and maintained and until about 1924 still believed and maintained that the foreclosure of 1875 was a valid foreclosure that passed title and possession of all the property out of the Federal corporation under the charter of the railroad of July 2, 1864 and accordingly they did not use that charter or reorganize under it or under whatever organization they thought the railroad was then being operated. Therefore, in 1896 they sought a new Federal charter from Congress to, in effect, revive the old railroad charter for reorganization but failing to get this, they hurriedly cast around for any kind of charter or company they could find and could control and they took up and used the railway company's so-called charter.

Since about 1924 the railway company officials and those associated with them, as above, have been advised by learned counsel, in whose advice they had

confidence and followed, that the 1875 proceeding was not a foreclosure and title and possession of the property, lands and assets of the railroad company did not pass out of it, but the same was continued and held in the possession and ownership of the railroad company.

Some years afterwards J. P. Morgan, the dominating figure in the 1896 proceedings herein described and one of the Voting Trustees, testified and admitted under oath that in 1896 the purchaser was the "old company"—the Northern Pacific Railroad Company, so petitioners are informed, believe and so charge. [905]

Eighteenth. The three so-called mortgages which were purported to be foreclosed in the fake foreclosure proceeding in 1896 in the United States District Court for the Eastern District of Wisconsin were known as the General Second Mortgage dated November 20, 1883, recorded in Volume 2, page 433 in the Interior Department, Third Mortgage dated December 1, 1887, recorded in Volume 1, page 181, and Consolidated Mortgage, dated December 2, 1889. All of these mortgages were executed after the railroad company's railroad and telegraph line had been fully built and completed in September, 1883, and could not have been used to aid in the construction and equipment of same.

The General First Mortgage dated January 1, 1881, recorded in Volume 2, page 371, set out in the fake foreclosure proceedings, was satisfied of record and released on November 17, 1899. The Missouri Division Mortgage, dated May 1, 1879, recorded in

Volume 2, page 255, was satisfied and released of record on July 2, 1900. The Pend d'Oreil Division Mortgage dated September 1, 1879, recorded in Volume 2, page 291, was satisfied and released of record July 2, 1900. In each of these so-called mortgages, the plan of reorganization of 1875 is recited together with the averment that the mortgage is executed with the voted consent of three-fourths of the preferred stockholders as provided by that plan.

Nineteenth. In the different suits filed in the United States Circuit Court for the Eastern District of Wisconsin by W. C. Sheldon & Co. and by the Farmers Loan & Trust Company and others, which were consolidated into the fake foreclosure suit, the Court was entirely without jurisdiction of the subject matter and all the proceedings therein were therefore null and void, and further, all the proceedings were by consent of the parties to the illegal and unlawful reorganization and fake foreclosure of 1896.

In a suit by the Farmers Loan & Trust Company against the railroad company and others in the United States Circuit Court for the District [906] of Washington in which that Court held (69 F. 871) that the Wisconsin Court was without jurisdiction, Brayton Ives, president of the Northern Pacific Railroad Company and on its behalf, in an affidavit seeking to have the receivers removed, stated as follows:

> "And deponent avers that no part of the railroad or land grant of the Northern Pacific

> Railroad Company was or ever has been situated within the Eastern District of Wisconsin, and that at the time of said appointment of said Receivers by the Circuit Court of the United States for the Eastern District of Wisconsin, there was no property of said Northern Pacific Railroad Company situate within the jurisdiction of said court, and that no part of the property covered by the mortgages to foreclose which said bill was filed and recited therein, and in aid of which said Receivers were so appointed, was situate within the said District."

All the land and property and assets of the railroad company in the State of Wisconsin were in the Western District of Wisconsin and none was in the Eastern District of Wisconsin.

The United States Court in Minnesota dismissed a suit of the creditors and stockholders as without jurisdiction. The purpose of these suits in Wisconsin, Minnesota, Washington and the other states traversed by the railroad company was to stop and forestall Brayton Ives, who was president, and his associates from taking over control of the board of directors and the property of the railroad company, which control they were just about to obtain.

Because of differences of opinion in the different districts a friendly petition by consent was presented to the four associate justices of the Supreme Court of the United States who were assigned to the four circuits traversed by the railroad company, seeking to have the Wisconsin Court made the

primary court. The ruling and order thereon reported in 72 F. 30 made by the four justices, who were not legally sitting as a Court, seems to have been had solely because desired and agreed to by all parties to the record. The order made, it will be perceived, is confined to the foreclosure and no mention is made of the creditors' bills; yet there were vast land grants east of the Missouri River, several million acres in Minnesota and large acreages in North Dakota, all of which were expressly exempt from the [907] operation of the mortgages. In the opinion of three of the justices they state:

> "In expressing these views, we are not to be understood as passing upon the proposition advanced in argument, but not necessary to be here considered, that it is competent for a circuit court of the United States, by consent of parties, to foreclose the mortgage of a railroad, no part of which is within the territorial jurisdiction of such Court."

Mr. Justice Brown's opinion was that the Wisconsin Court had no jurisdiction to foreclose the mortgage but he acceded to the wishes of the others as a matter of expediency.

The decree of foreclosure directed a sale under the mortgages, of stocks, bonds and other property in the hands of the receivers which were not in any way covered by the mortgages.

This was entirely independent of the separate decrees directing sales to the new company by the

receiver of securities pledged for Receiver's Certificates and Collateral Trust Notes.

In the Reorganization Plan and Statement it is set forth that the lien of the 2nd and 3rd mortgages is only upon the main line, the Cokedale Spur, ½ of the line, Carlton to Duluth, and upon the Land Grant, yet in entering the decree it is declared that the 2nd mortgage is a lien not only upon those things but "upon all the stocks and bonds in other companies owned by the defendant, "The Northern Pacific Railroad Company, at the time of the appointment of receivers . . . October 13th, 1893, other than stocks and bonds, pledged under the Consolidated Mortgage, and all the right title and interest of said defendant . . . in such pledged stocks and bonds, subject to the rights of the pledgees thereof."

The sale was decreed accordingly under the mortgage.

These decrees were consent decrees, acquiesced in by the Directors and "Protective Committee" of the railroad company in furtherance of the unlawful plan to acquire the property of the railroad company for the railway corporation. [908]

The lands and land grants west of the Missouri River and covered by the terms of the mortgage were sold under a supplemental decree in a manner directly contravening the resolution of Congress, under which it is contended, the mortgages were executed, and also contravening the Act of Congress of March 3rd, 1893.

These lands are upwards of thirty millions of acres, and are worth many millions of dollars.

The resolution of Congress of 1870 stipulated as follows:

> "If the mortgage hereby authorized shall at any time be enforced by foreclosure, . . . or the mortgaged lands hereby granted, or any of them, be sold . . . such lands shall be sold at public sale at places within the states and territories in which they shall be situate after not less than sixty days previous notice, in single sections or subdivisions thereof to the highest and best bidder."

By Section 1 of the Act of Congress of March 1st, 1893, it is provided:

> "That all real estate or any interest in land sold under any order or decree of any United States Court, shall be sold at public sale at the court house of the county, parish, or city in which the property or the greater part thereof is located, or upon the premises, as the court rendering such order or decree of sale may direct."

The following and other violations of the law were had in these proceedings:

First: All the lands, patented and unpatented, were sold in but one place in each of the states in which the lands were situated, and not in the respective counties where situated.

Second: The lands for which patents had not been issued were not sold in single sections or sub-divisions, but were sold lumpingly at the place in each State as above stated, for the sum of $500,000 for the lands in each State.

To acquire the remaining lands in Minnesota and North Dakota, east of the Missouri River, and not covered by the mortgages, the same being expressly exempt,—the railway company experienced great difficulty and had to wait three years until 1899 when a null and void order to sell in sequestration proceedings was made upon the Petition of the Receivers. The Receivers took the precaution to have sales made in each county of the State, but the unpatented, unsurveyed and [909] unlocated lands were sold lumpingly and not in single sections or sub-divisions. "With respect to lands it is quite certain that sequestrators acquire no title and hence can make no sale." Freeman on Executions, 125(a). A receiver in sequestration proceedings acquires no title to the real estate and has but a right to the possession. Forster v. Townsend, 48 N. Y. 203.

After acquiring the property, thus sold, the new company obtained two further and separate decrees, one in August, 1896, decreeing a sale to it for the face value of the outstanding receiver's certificates (all of which it held), of all the securities—millions in value of excess—deposited as collateral for the payment of such certificates—and one other decree in October 1896 of all the securities (over 33 millions in value) deposited as collateral for the payment of

the Collateral Trust Notes which amounted to but 10 millions of dollars, and all of which were deposited with the Reorganization Managers under the Reorganization Plan to be settled for by the payment of but 7% in cash and the balance in bonds and stock of the new company.

These were collusive and illegal consent decrees and at the time practically the same directors acted for both companies. The railroad company lost—the railway company profited to the extent of many millions of dollars by the transactions.

Lack of jurisdiction by the Court can be attacked collaterally and the Supreme Court in Thompson vs. Whitman, 18 Wall. 457; 21 L. ed. 897 found and determined that neither the constitutional provision that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state, or the Act of Congress passed in pursuance thereof, prevents an inquiry into the jurisdiction of the court by which a judgment offered in evidence was rendered. The record of a judgment rendered in another state may be contradicted as to the facts necessary to give the court jurisdiction, and if it be shown that such facts did not exist, the record will be a nullity, notwithstanding it may recite that they did exist. Want of jurisdiction may be shown, either as to the subject-matter or to the person, or in proceedings in rem as to the thing. [910] By a law of New Jersey, non-residents were prohibited from raking clams and oysters in the waters of that state, under penalty

of forfeiture of the vessel employed; and any two justices of the county in which the seizure of the vessel should be made were authorized, upon information given, to hear and determine the case; held that if the seizure was not made in the county where the prosecution took place, the justices of that county had no jurisdiction, and that this fact might be inquired into in an action for making such seizure, brought in New York, notwithstanding the record of a conviction was produced, which stated that the seizure was made within such county.

In a petition sworn to by the receivers of the railroad company dated September 3, 1897 filed in the United States Circuit Court for the Eastern District of Wisconsin it is stated that the lands of the grant in Minnesota and North Dakota east of the Missouri River amounted to 3,738,874 acres and cited the general first mortgage, the amount of which on March 6, 1896, according to the plan, was $41,879,000. By another fraudulent, consent and collusive decree of April 27, 1899, and a decree amending it November 25, 1899 (JCC 1441-45), this plan of sale was arranged by the group controlling the then railway system as part of its fraudulent and collusive scheme to capture, hold and prevent anyone else from buying and purchasing lands of the railroad company as no one could buy one or more single sections without taking it subject to the $41,879,000 of the first trust, as there was no arrangement under the trust or in the decree or proceedings whereby single or group sections could be re-

leased from the trust. The sale under these decrees was not carried out according to and was in contravention of the charter and the statutes, and the sale having been made to the railway company, the Court, on affirming the report, entered a deficiency judgment of "more than $87,000,000" in favor of the railway against the railroad.

These 3,738,874 acres were sold for $837,850 and the railway paid in cash because it was required to make a deposit of 10% at the [911] sale in the amount of $83,785, leaving a balance on the purchase price of $757,075, which the Court allowed it to offset against the deficiency judgment for more than $87,000,000, leaving a balance on the deficiency judgment of "more than $86,242,925."

This judgment was fraudulent and obtained under an unlawful and illegal consent and collusive decree on bonds of the railroad company which had been paid and satisfied in the purchase price under the so-called reorganization plan and the railway company had issued its new bonds in lieu of same and had certified to those taking the bonds and the public, to whom the bonds were offered, that the bonds of the railway company so issued were first liens on the property of the railroad company.

This so-called fraudulent and collusive judgment of a balance of more than $86,242,925 was taken in part for the purpose of trying to hold or establish some kind of lien on the lands and property of the railroad company, as the parties to the said collusive agreement and decrees realized that they did

not pass valid title from the railroad company to the railway company.

The so-called foreclosure sale in 1896 likewise was fraudulently and collusively arranged so that all of the lands and property of the railroad company described in the decree would be sold subject to the then first mortgage, and the portion covered by the Missouri Division would be sold subject to the first mortgage and the Missouri Division mortgage which amounted at that time to $1,815,500. The land covered by the Pend d'Oreil was sold subject to the first mortgage and to the Pend d'Oreil mortgage, which then amounted to $357,000, thus making it imperative that all the land be bought by one person or corporation, and that settlers, individuals and smaller corporations could not buy part without taking it subject to and being liable for the first mortgage and, if covered by them, the Missouri Division mortgage and the Pend d'Oreil mortgage.

[912]

Charles Donnelly, president of the railway company (formerly general counsel of the railway company) testified before the Joint Congressional Committee and stated that the stockholders of the railway company were substantially the same as those of the railroad company and that the holders of securities of the railway company were substantially the same as those who had held the securities of the railroad company. He also stated, seemingly in contradiction of the company's answer in the case of United States vs. Northern Pacific Railroad Com-

pany, 134 F. 715 (Paragraph 16 above), that the "obligations of the new company imposed by the original act, of course—the obligations imposed by the original act upon the old company do, of course, rest upon the new company. Whatever the old company had to do we had to do." (The old company was the railroad company, the new company the railway company.)

James B. Kerr, who was for many years attorney for the railway company and represented it before the Joint Congressional Committee (Part 2, page 892) in discussing 93 U. S. 442, admitted that under the railroad company act of July 2, 1864 the railroad became, in a sense, an agency of the Government and the Government reserved the right to amend the charter.

In United States vs. Northern Pacific Railway Company, 256 U. S. 51, the bill alleged:

> "That the defendant, Northern Pacific Railway Company, is the assignee and successor in interest of the said Northern Pacific Railroad Company, to any and to all the properties, lands, rights, grants, privileges and franchises granted to said Northern Pacific Railroad Company by the Act of July 2, 1864 and by all acts supplemental thereto."

And the answer of the railway company admitted:

> "It is true that the Defendant is a corporation and is the assignee and successor in interest of the—etc."

The main line from Ashland to Wallula, the Cascade Branch, Pasco to Tacoma, Portland to Tacoma and Bridges was 2,133.1 miles and cost $67,271,-251.78, so these petitioners are informed (JCC, Part 4, pages 2021-22). [913]

Under the so-called and fake foreclosure decree in 1896 Commissioner Cary sold at one place in Wisconsin on July 25, 1896, 8,632.50 acres of patented and certified lands in Wisconsin for $4100, which was 44¢ per acre, and he also sold all of the unsurveyed and unidentified lands in Wisconsin as one parcel for $500,000 to the railway company.

On July 29, 1896 he sold at Missoula, Montana, 5,298,598.67 acres of patented and certified lands in Montana for $937,900, which was 17¢ per acre, and all of the unsurveyed and uncertified lands in Montana as one parcel for $500,000 to the railway company.

He sold in North Dakota 2,072,504.9 acres of patented and certified lands for $343,900, which was 16¢ per acre, and he also sold all of the unsurveyed and unidentified lands in North Dakota as one parcel for $500,000 to the railway company.

He sold in Idaho 234,808.46 acres of patented and certified lands for $50,400, which was 21¢ per acre, and he also sold all of the unsurveyed and unidentified lands in Idaho as one parcel for $500,000 to the railway company.

He sold in Oregon 313,583.91 acres of patented and certified lands for $58,800, which was 16¢ per acre, and he also sold all of the unsurveyed and un-

identified lands in Oregon as one parcel for $500,000 to the railway company.

He sold in Washington 6,360,958 acres of patented and certified lands for $1,210,100, which was 19¢ per acre, and he also sold all of the unsurveyed and unidentified lands in Washington as one parcel for $500,000 to the railway company.

This makes a total acreage sold in the six states of patented and certified lands of 14,289,086 acres at $2,605,200 or 18¢ per acre and all the unsurveyed and unidentified lands in the six states for $3,000,000. All of these lands were sold subject to the

first mortgage of	$41,879,000
Part of the lands subject to Missouri Division Mortgage	$ 1,815,500
Part of the lands subject to Pend d'Oreille Mortgage	$ 357,000
Total mortgages	$44,051,500

[914]

As part of the fraudulent and illegal scheme of officials of the railway and railroad companies and the Reorganization Managers these lands were sold without any provision in the decree, the mortgage or proceedings for the release of any acre or section or part of any tract in any state or all the states from any or all of these mortgages on behalf of any independent purchaser; this was done so as to make it imperative for the railway company and no one else to buy, as there was no other organization, corporation or association that was authorized under

the laws of the United States and of the various states that could buy the entire property.

For this reason the property by consent was sold thus, so these petitioners are informed, believe and charge, and it is more than probable that the Court did not understand the circumstances and conditions and situations.

At the time of the sales the railway company made the 10% deposit required, but it was made in second mortgage bonds of the railroad company, and these petitioners are informed, advised, believe and charge that only the said 10% of the purchase price of the above described acreage of 14,289,086 acres and all of the unsurveyed and unidentified lands in the six states was ever actually paid by the railway company, although it was agreed that the full purchase price could be in second mortgage bonds of the railroad company. No actual cash was paid by the railway company in the 10% deposit or otherwise. These sales were not in good faith and bona fide in accordance with the Joint Resolution of May 31, 1870. At the time of the sales the railway company had, as hereinbefore stated,

General Second Mortgage Bonds of the Railroad Company	$19,078,000
General Third Mortgage Bonds of the Railroad Company	11,267,000
Consolidated Bonds of the Railroad Company	44,923,000
Total	$75,268,000

Yet, as hereinelsewhere alleged, the railway company took an unlawful, illegal, invalid and void judgment by collusion and consent [915] against the railroad company for "more than $87,000,000." The sales of the land in Minnesota and North Dakota under the decree of 1899 were made three a day in different counties at 9:00 A. M., 2:00 P. M. and 4:00 P. M., which was illegal, invalid and void as the first and last hours were unreasonable times.

These petitioners are informed, believe and charge that all of the sales by Commissioner Cary in 1896 and 1899 were fake, fictitious, and perfunctory performances and no one sale lasted more than one-half hour, although several million acres were sold in each of three of the sales.

James B. Kerr, attorney for the railway company in the hearings before the Joint Congressional Committee, testified in the hearings as follows:

> "Senator Kendrick: Mr. Kerr, when those lands were sold under that foreclosure, where did the title to them then rest?
>
> Mr. Kerr: In 1875?
>
> Senator Kendrick: No; I mean in 1896.
>
> Mr. Kerr: It rested in the purchaser, which was the reorganization committee, made up of the representatives of the holders of bonds and securities of the old Northern Pacific Railroad Co. They acquired title to them, and when the sale was affirmed, what they purchased at the foreclosure sale was conveyed to them, or assigned by them to the Northern Pacific Rail-

way Co., and the special master and the receivers and the railroad company itself, under the direction of the court, made deeds to the Northern Pacific Railway Co., the Wisconsin corporation."

This evidences that there were secret agreements, arrangements, plans and transactions in 1896 in the so-called reorganization and fake foreclosure that are still secreted, hidden and covered up by the officials of the railway company and other parties thereto.

The plan of reorganization provides that the assenting stockholders of the railroad company were to assign their stock to the Reorganization Managers as co-partners and there may have been an undisclosed agreement, arrangement or plan for the partnership or some other partnership to take over all the assets and properties under the name of Northern Pacific Railway Company.

Twentieth. These petitioners change the word "some" to the word "any" in the line reading as follows: "The property of some of the mortgages or the United States" so that it will read "The property of any of the mortgages or the United States" in line 11 of the second [916] paragraph of Paragraph LI of the cross bill filed by these petitioners on behalf of the railroad company in this suit.

An act in the Minnesota General Laws of 1879, page 87, is as follows:

"An Act to facilitate the operation and construction of the Northern Pacific Railroad.

Section 1. The Northern Pacific Railroad Company shall have the right and authority under and pursuant to the general laws of this State, as set forth in sections numbered thirteen (13), fourteen (14), fifteen (15), sixteen (16), seventeen (17), nineteen (19), twenty (20), twenty-one (21), twenty-two (22), twenty-three (23), twenty-five (25), twenty-six (26), twenty-seven (27), twenty-eight (28), twenty-nine (29), thirty (30), and thirty-one (31) of title one (1), of chapter thirty-four (34) of the General Statutes (Revision of 1866) as amended by chapter fifty-three (53) of the General Laws of one thousand eight hundred and seventy-two (1872), and chapter fourteen (14) of the General Laws of A. D., one thousand eight hundred and seventy-five (1875), to condemn for public use and to acquire and hold all the real estate and property that are or may be needed by said company for right of way, depot grounds, engine houses, machine shops, and for all other purposes for which such real estate or property is or may be needed by said company in the operation or construction of any line or lines of railroad, including not only all lines of railroad that have been or may be constructed or acquired by said company, but also all other lines of railroad that now are or may hereafter be operated either entirely or in part by said company, under any lease, contract or other arrangement between said company and any other party or parties.

Sec. 2. This act is hereby declared to be a public act, and shall take effect and be in force from and after its passage.

Approved February 14, 1879."

Twenty-one: If this Court should happen to hold against the contention of these petitioners that the so-called reorganization proceedings and fake foreclosure were null, void and illegal, unlawful and fraudulent, then these petitioners and others similarly situated who have been co-operating with them are entitled to relief in the alternative. The United States Supreme Court in Southern Pacific Co. vs. Bogert, 250 U. S. 483; 63 L. ed. 1099 found and determined as follows:

"First. The Southern Pacific contends that plaintiffs are barred by laches. The reorganization agreement is dated December 20, 1887; the decree of foreclosure and sale was entered May 4, 1888; the sale was held September 8, 1888; and the stock in the new company was delivered to the Southern Pacific on February 10, 1891. This suit was not begun until July 26, 1913; and not until that time was there a proper attempt to assert the specific equity here enforced; namely, that the Southern Pacific received the stock in the new Houston Company as trustee for the stockholders of the old. More than twenty-two years had thus elapsed since the wrong complained of was committed. But the essence of laches is not merely lapse of

time. It is essential that there be also acquiescence in the alleged wrong, or lack of dili- [917] gence in seeking a remedy. Here plaintiffs, or others representing them, protested as soon as the terms of the reorganization agreements were announced; and ever since, they have with rare pertinacity, and undaunted by failure, persisted in the diligent pursuit of a remedy, as the schedule of the earlier litigation referred to in the margin demonstrates. Where the cause of action is of such a nature that a suit to enforce it would be brought on behalf not only of the plaintiff but of all persons similarly situated, it is not essential that each such person should intervene in the suit brought in order that he be deemed thereafter free from the laches which bars those who sleep on their rights. Cox vs. Stokes, 156 N. Y. 491, 511, 51 N. E. 316. Nor does failure, long continued, to discover the appropriate remedy, though well known, establish laches where there has been due diligence and, as the lower courts have here found, the defendant was not prejudiced by the delay."

* * * * * * *

"Because of such wide divergence the earlier decrees do not operate as res judicata. And there is no basis for the claim of estoppel by election; nor any reason why the minority, who failed in the attempt to recover on one theory, because unsupported by the facts, should not be permitted to recover on another for which the

facts afford ample basis. William W. Bierce v. Hutchins, 205 U. S. 340, 347, 51 L. Ed. 828, 833, 27 Sup. Ct. Rep. 524."

* * * * * * *

"Third. The Southern Pacific challenges the claim for relief on the ground that it took the new Houston Company stock, not as majority stockholder, but as underwriter or banker under the reorganization agreement. The essential facts are these: While dominating the old company through control of a majority of its stock, the Southern Pacific entered into its reorganization, under an agreement by which the minority stockholders of the old company could obtain stock in the new only upon payment in cash of a prohibitive assessment of $71.40 per share (said to be required to satisfy the floating debt and reorganization expenses and charges), while the Southern Pacific was enabled to acquire all the stock in the new company upon paying an assessment of $26 per share (said to be the amount required to satisfy reorganization expenses and charges.) The Southern Pacific asserts that, unlike the minority stockholders, it assumed an underwriter's obligation to take the new company's stock not subscribed for by the minority, and also guaranteed part of the principal and all of the interest on the new company's bonds, which were given in exchange for those of the old company. But the purpose of the Southern Pacific in assuming

these obligations was in no sense to perform the function of banker. It was to secure the incorporation of the Houston Railroad into its own transcontinental system. And it was never called upon to pay anything under its guaranty."

* * * * * * *

"Fifth. Equally unfounded is the contention that the Southern Pacific cannot be held liable because it was not guilty of fraud or mismanagement. The essential of the liability to account sought to be enforced in this suit lies not in fraud or mismanagement, but in the fact that, having become a fiduciary through taking control of the old Houston Company, the Southern Pacific has secured fruits which it has not shared with the minority. The wrong lay not in acquiring the stock, but in refusing to make a pro rata distribution on equal terms among the old Houston Company shareholders."

* * * * * * *

"Seventh. The Southern Pacific also contends that the decree is erroneous because the effect is to give the minority their pro rata share in the new Houston Company without their having made any contribution towards satisfying the floating indebtedness of the old; whereas, the floating-debt creditors had a claim against the property prior in interest to that of the old company's stockholders. Kansas City Southern R. Co. v. Guardian Trust Co., 240

U. S. 166, 60 L. ed. 579, 36 Sup. Ct. Rep. 334; Northern P. R. Co. v. Boyd, 228 U. S. 482, 57 L. ed. 931, [918] 33 Sup. Ct. Rep. 554. The fact that no provision was made for the floating indebtedness is not a bar to the minority obtaining relief. They did not come into court with unclean hands because there were floating-debt creditors unpaid. If any floating-debt creditors have been illegally deprived of rights, it was not by the minority's acts."

* * * * * * *

"Eleventh. The certiorari and return were filed May 3, 1918. On October 8, 1918, separate petitions were filed in this court by Henry J. Chase, by Fergus Reid, by Albert M. Polack, by Francis P. O'Reilly, and by the Corn Exchange Bank, alleging that they were respectively owners of stock in the old Houston Company and praying leave to intervene and that they be permitted to share in the benefits of the decree, or in the alternative, that they be permitted to make such application to the district court. Action on these petitions was postponed to the hearing of the case on the merits. As the case must be remanded to the district court for further proceedings as above stated, we deny these several petitions without expressing any opinion on their merits and without prejudice to the right to apply to the district court for leave to intervene and share in the benefits of the decree."

The District Court in the same case (226 F. 500 at 512), which was affirmed, found and determined as follows:

> "It must be held that the defendant has, for the purposes of the present action, obtained the property free from any lien or claims of the general creditors. The plaintiffs did not have an opportunity to prevent the action of the majority stockholders, in thus acquiring the property of the railway company, and the Southern Pacific Company acquired this property subject to any equitable rights which the minority stockholders might have therein. Such cases as Ervin v. Oregon Ry. & Navigation Co. (C. C.) 27 Fed. 625; Farmers' Loan & Trust Co. v. N. Y. & N. R. Co., 150 N. Y. 410, 44 N. E. 1043, 34 L. R. A. 76, 55 Am. St. Rep. 689; Sparrow v. Bement, 142 Mich. 441, 105 N. W. 881, 10 L. R. A. (N. S.) 725; Backus v. Brooks, 195 Fed. 452, 115 C. C. A. 354; Cook on Corp. Sec. 662, and cases cited; Synnott v. Cummings (C. C.) 116 Fed. 40—sufficiently establish the proposition that the minority stockholders had rights which they could enforce against the property in the hands of the majority stockholders. In enforcing these rights, they can insist upon an accounting and division of their property in equity, leaving the property, that is, the shares of stock in their hands, subject to any claims which are still valid and enforceable against the stockholders, either through the

Houston & Texas Central Railway Company itself, or against the stockholders directly."

All of the Northern Pacific Railroad Company's debts and obligations and all of its stock (Paragraph 6, pages 13 and 14 of this petition) except the non-assenting stockholders, and all of the reorganization expenses were paid and satisfied without the Syndicate Members having to put up a cent or having to make good or pay a cent on their guaranty and without any cost to the railway company (Paragraph 11 of this petition) sufficient stock of the railway company issued by it as part of its agreed purchase price, which could more than pay the non-assenting stockholders, including these petitioners and those associated with them, the $3,255,900 par value of their railroad stock and also their pro- [919] portion of all dividends declared on railway company stock since 1896, was returned to the railway company in 1897 in addition to the other stocks, bonds and securities, also part of said purchase price, that were similarly returned to the railway company as listed and set out in Paragraphs 8 and 14 of this petition.

These petitioners are advised and charge that the railway company, its officers and officials are holding all of the preferred and common stock of the railroad company now in its possession, ownership or control as trustees for the holders and owners of the securities and stocks of the railway company issued since July 1, 1896, whether issued as a

corporation, a de facto corporation, a partnership or other association and the said railway company, its officers and officials should be enjoined and restrained from in any manner selling, disposing of or transferring said preferred and common stock of the railroad company or any part thereof or a trustee should be appointed to take possession and control of same for the security and protection, of the holders of any and all securities and stocks issued by the said railway company since July 1, 1896, and of the public in order that there may be no break in the market of said securities and stocks of said railway company.

In the book entitled "Some Legal Phases of Corporate Financing, Re-Organization and Regulation," by Francis Lynde Stetson, James Byrne, Paul D. Cravath, George W. Wickersham, Gilbert H. Montague, George S. Coleman and William D. Guthrie, it is stated at page 212:

> "Except in a comparatively rare case of redeemable preferred stock, there is usually no way in a voluntary readjustment by which the status of stock can be changed without the consent of its holders, nevertheless it becomes necessary in such a case to continue the non-assenting stock without disturbing its status, except so far as may be permitted by the exercise of the powers expressly conferred by the corporation's charter or by the statute subject to which the corporation was reorganized."

This book also says that they hoped to be relieved from the terrors of the Boyd case but instead it was practically re-affirmed in Kansas City Southern Railroad Co. v. Guardian Trust Co., 240 U. S. 166; 60 L. ed. 579. [920]

In United States vs. N. O. P. Ry. Co., 248 U. S. 507; 63 L. ed. 388, the Court found and determined:

> "As the patents were issued before and the suits were brought more than five years after the act * * *, the prayer that the patents be cancelled must be put out of view and the alternative prayer that the title under the patent be declared to be held in trust for the homestead claimants and the trust enforced must be regarded as if standing alone."

And the trust was established and enforced. [921]

Wherefore, these petitioners on behalf of themselves and all other stockholders of the Northern Pacific Railroad Company similarly situated pray:

(A) That they may be permitted to file this petition, that process issue and that the plaintiff and the defendants be required to answer same, but not under oath, as answer under oath is expressly waived.

(B) That all the relief prayed for in Paragraphs (a) to (k) both inclusive, in the answer and cross bill filed by these petitioners on behalf of the railroad company in this suit on September 3, 1937 be granted.

(C) That the Court find, declare and decree that the 1896 so-called reorganization and fake fore-

closure be declared to have been illegal, unlawful, fraudulent and in fraud of the Court and in fraud of these petitioners and other stockholders likewise situated; that the United States Circuit Court for the Eastern District of Wisconsin was without jurisdiction and that all its orders and proceedings were absolutely null and void and were obtained by fraud on the Court.

(D) That the Court find, declare and decree that all of the preferred and common stock of the railroad company now in the ownership, possession or control of the railway company be declared a trust fund for the holders and owners of the securities and stocks issued by the railway company since July 1, 1896 and that the said railway company, its officers and officials be enjoined and restrained from in any manner selling, disposing of or transferring said preferred and common stock of the railroad company or any part thereof and that the said railway company, its officers and officials be mandatorily required to hold said preferred and common stock of the railroad company or to turn it over to a trustee to be appointed by this Court to be held as security for and protection of the holders and owners of securities and stocks of the said railway company issued since July 1, 1896.

[922]

(E) That in the event the Court should deny these petitioners the relief prayed for above and by reference prayed for in the answer and cross bill of these petitioners on behalf of the railroad

company in this suit, that then and in that event the Court find, declare and decree that the railway company, illegally, unlawfully and in fraud of these petitioners and other stockholders of the railroad company likewise situated, in 1896 held sufficient stock of the railway company isued by it as part of its agreed purchase price of the lands, properties and assets of the railroad company, to more than pay the non-assenting stockholders of the railroad company, including these petitioners and those associated with them, the $3,255,900 par value of their railroad company stock and also their proportion of all dividends declared on said railway company stock since 1896, and that said stock in justice and equity is the property of and belongs to these petitioners and other stockholders likewise situated, and that the Court issue a mandatory injunction requiring the railway company to deliver such stock and pay such dividends to these petitioners and other stockholders likewise situated, and a judgment be entered against the railway company for the par value of said stock plus the dividends declared on same since July 1, 1896 in favor of these petitioners and other stockholders likewise situated.

(F) That the Court find, declare and decree all other further and general relief to these petitioners and other stockholders of the railroad company likewise situated who may come in and share the costs of this petition, as their cause may require and to equity may seem just and proper, in-

cluding counsel fees and costs. And they will ever pray.

WALTER L. HAEHNLEN

.....

Charles E. Schmidt

.....

George Landell, Executor of
E. A. Landell

.....

Clarence Loebenthal, Trustee
of Bernard Loebenthal
By Counsel [923]

THOMAS BOYLAN
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RAYMOND M. HUDSON
MINOR HUDSON
GEOFFREY CREYKE
Peoples Life Ins. Bldg.
Washington, D. C.
Solicitors for Petitioners

State of Pennsylvania
County of Philadelphia—ss.

I, Walter L. Haehnlen, being first duly sworn, depose and state that I am one of the petitioners in

the foregoing petition, which I have read, and the facts stated therein are true to the best of my knowledge, information and belief.

WALTER L. HAEHNLEN

Subscribed and sworn to before me and given under my hand and seal this the 20th day of January, 1938. My commission expires the 8th day of April, 1941.

[Seal] CLAUDE E. FRENCH
Notary Public for County of Philadelphia, State of Pennsylvania
Notary Public.

My Commission expires April 8, 1941. [924]

INTERROGATORIES WHICH THE NORTHERN PACIFIC RAILROAD COMPANY AND NORTHERN PACIFIC RAILWAY COMPANY ARE REQUIRED TO ANSWER AND DOCUMENTS THEY ARE REQUIRED TO FILE AND SERVE A COPY OF ON PETITIONERS

These petitioners give notice to the Court that the information and the documents, papers and correspondence required in these interrogatories are material and relevant to this cause and to enable these petitioners to present and make out their cause of action, and the said information, documents, papers and correspondence are known by and are in the possession of the Northern Pacific

Railway Company and Northern Pacific Railroad Company.

1. State all of the dividends declared and/or paid since July 1, 1896 on the common and preferred stock of the Northern Pacific Railway Company, giving the date and the amount of each.

2. State how many of the 7.3% bonds of the Northern Pacific Railroad Company of July 1, 1870 were deposited with the Farmers Loan & Trust Company of New York in 1875 and 1876.

3. State whether or not the said bonds or any of them, and if so, how many, are still on deposit with the Farmers Loan & Trust Company of New York. If any have been withdrawn, by whom and for what purpose and where are they now ?

4. Was not a large block of the stock of the Northern Pacific Railroad Company deposited in 1870 or 1875 in the Central Trust Company?

5. If the answer to the foregoing question is in the affirmative, state how much stock was so deposited and whether all or any part is still there.

6. If any of the stock has been withdrawn, state when, by whom, for what purpose, the amount of same, and where the stock is now.

7. File and serve copies of all minutes of the meetings of the incorporators, stockholders and board of directors of the railroad company from July 2, 1864 to date.

8. File and serve copies of all minutes of the meetings of the incorporators, stockholders and board of directors of the railway company from date of incorporation to date. [925]

9. How many shares of common and preferred stock of the Northern Pacific Railroad Company is held or owned by the Northern Pacific Railway Company at this time and state when and from whom received, for what consideration and under what terms and conditions, and when transferred on the books of the railroad company to the railway company with the name of the transferrer.

10. File and serve a copy of the report of the Purchasing Committee of the railroad company in 1875 filed at the meeting of the board and stockholders on September 9, 1875.

11. File and serve a copy of the contract between the railroad company and the proprietors of the City of Superior, Wisconsin, by which they were to convey one-third of their interest in the city to the Northern Pacific Company in consideration of the extension of the main line eastward from Thompson's Junction as far as Superior within the year 1881.

12. File and serve a copy of the map filed by the railroad company in the General Land Office July 3, 1882.

13. File and serve a copy of the report of the railway company of June 30, 1898, showing as in its treasury 2600 Northern Pacific Railroad Company 7.3% bonds.

14. File and serve a copy of all the annual reports of the railroad company and of the railway company from the dates of their incorporation to this date.

15. What was the consideration for the assignment from the Farmers Loan and Trust Company of New York to the railway company on October 20, 1899, of two judgments in the Circuit Court of the United States for the District of Minnesota against the railroad company for $1,144,948.39 and $686,-552.99, dated the 4th day of May, 1896?

16. How and where were the said two judgments paid and satisfied, as they were released on November 29, 1899? [926]

17. File and serve a copy of the brief and of the answer of the railway company in the proceedings in the Interstate Commerce Commission entitled "City of Spokane vs. Northern Pacific Railway Company."

18. File and serve a copy of all maps of definite location filed by the railway company and by the railroad company.

19. File and serve copies of all maps of line of route filed by the railway company and by the railroad company.

20. Were there not two different kinds or characters of preferred stock issued by the railroad company during and after 1875?

21. If so, describe fully and in detail each kind and state how much of each kind was issued and all of those to whom each kind was issued.

22. Was not there an unauthorized issue of the consolidated bonds under the mortgage dated December 2, 1889?

23. If so, give the amounts and dates of such unauthorized bonds and to whom they were delivered.

24. Was not there an over-issue of consolidated bonds under the mortgage dated December 2, 1889?

25. If so, give the amounts and date of such over-issue of consolidated bonds and to whom they were delivered.

THOMAS BOYLAN
Liberty Trust Building
Philadelphia, Pennsylvania
ROBERT L. EDMISTON
Title Building
Spokane, Washington
RAYMOND M. HUDSON
MINOR HUDSON
GEOFFREY CREYKE JR.
Peoples Life Insurance Bldg.
Washington, D. C.
Solicitors for Petitioners

[Endorsed]: Filed Jan. 31, 1938. [927]

[Title of District Court and Cause.]

APPEARANCE

To the Clerk of the above entitled Court:

You will please enter the appearance of the undersigned attorneys or solicitors for the defendant Northern Pacific Railroad Company, which defendant hereby also enters its appearance in the

above entitled case, covering its answer filed therein September 3, 1937, together with all other interests of said defendant involved in said case, reserving all rights, and subject to court rules and procedure.

Dated this 14th day of February, 1938.

NORTHERN PACIFIC RAILROAD CO.
By THOMAS BOYLAN
Liberty Trust Building
Philadelphia, Pennsylvania
ROBERT L. EDMISTON
Title Building
Spokane, Washington
RAYMOND M. HUDSON
MINOR HUDSON
GEOFFREY CREYKE JR. E
People's Life Insurance Bldg.
Washington, D. C.

[Endorsed]: Filed Feb. 14, 1938. [928]

[Title of District Court and Cause.]

APPEARANCE

To the Clerk of the above entitled Court:

You will please enter the appearance of the above named intervenors in the above entitled action by their undersigned attorneys or solicitors, covering their intervention petition filed in said case January 31st, 1938, together with all interests of said intervenors involved in the above entitled action, waiving no rights, and subject to court rules and procedure.

Dated this 14th day of February, 1938.

CHARLES E. SCHMIDT
and other stockholders of the
N. P. Railroad Co.
By THOMAS BOYLAN E
Liberty Trust Building
Philadelphia, Pennsylvania
ROBERT L. EDMISTON
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RAYMOND M. HUDSON E
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GEOFFREY CREYKE JR. E
People's Life Insurance Bldg.
Washington, D. C.

[Endorsed]: Filed Feb. 14, 1938. [929]

[Title of District Court and Cause.]

MOTION OF THE NORTHERN PACIFIC RAILROAD COMPANY BY CHARLES E. SCHMIDT AND OTHERS, MINORITY STOCKHOLDERS, AND OF SAID CHARLES E. SCHMIDT AND OTHERS, MINORITY STOCKHOLDERS, PETITIONERS, TO CONSTRUE, MODIFY AND/OR AMEND THE REPORT OF SPECIAL MASTER GRAVES FILED JULY 26, 1937

1. Now comes the Northern Pacific Railroad Company by Charles E. Schmidt and others, minor-

ity stockholders who have heretofore filed an answer on behalf of the said railroad herein and also now come the said Charles E. Schmidt and others, minority stockholders of the said railroad company who filed an intervening petition herein, and move the Court to construe, modify and/or amend the report of Special Master F. H. Graves filed in this cause on July 26, 1937, so as to make the report state and read that wherever in the report the words "the company" or the words "the railway company" or the words "Northern Pacific Railway Company" or the words "railroad," "Northern Pacific" or "defendant" are used, that they and each of them shall be intended to mean and shall mean the Northern Pacific Railroad Company created under the Act of Congress of July 2, 1864 or the so-called Northern Pacific Railway Company, the Wisconsin corporation, whichever the Court on final decree shall hold and determine is the owner, and entitled to possession, of the land, land grants, rights to land, property and all other assets involved in and covered by the said report.

2. Or in the alternative, if the Court is of the opinion that it has not the power to construe, modify and/or amend the [930] said report, that then the Court require Special Master Graves to construe, modify and/or amend the said report as set out in Paragraph 1 of this motion.

3. (a) The words "the company" occur on pages 11, 30, 36, 37, 38, 41, 64, 66, 67, 68, 70, 72, 73, 75, 88, 90, 91, 93, 95, 98, 102, 105, 108, 110, 112, 115,

116, 119, 138, 146, 147, 150, 151, 152 and other pages.

(b) The words "the railway company" appear on pages 13, 18, 23, 24, 67, 68, 69, 88, 101, 112, 116, 117, 122, 137, 139, 150 in (d), 153, 155 and other pages.

(c) The words "The Northern Pacific Railway Company" occur on pages 150 in (c) and 153 and other pages.

(d) The words "railroad", "N. P.", "Northern Pacific" or "defendant" occur on pages 25, 29, 40, 41, 46, 55, 58, 64, 86, 119, 144, 145, 146, 149, 152, 153, 154 and other pages.

Respectfully submitted

THOMAS BOYLAN
Liberty Trust Building
Philadelphia, Pa.

ROBERT L. EDMISTON
Title Building
Spokane, Washington

RAYMOND M. HUDSON
MINOR HUDSON H
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People's Life Insurance Bldg.
Washington, D. C.

Attorneys for Petitioners and Northern Pacific Railroad Co.

Copy received Feb. 19, 1938.

SAM M. DRIVES
E.G.F.
F. J. McKEVITT [931]

[Title of District Court and Cause.]

EXCEPTIONS OF NORTHERN PACIFIC RAILROAD COMPANY BY CHARLES E. SCHMIDT AND OTHERS, MINORITY STOCKHOLDERS, AND OF SAID CHARLES E. SCHMIDT AND OTHERS, MINORITY STOCKHOLDERS, PETITIONERS, TO THE REPORT OF SPECIAL MASTER GRAVES FILED JULY 26, 1937.

1. Now comes the Northern Pacific Railroad Company by Charles E. Schmidt and others, minority stockholders, and said Charles E. Schmidt and others, minority stockholders, petitioners, and except to the said report filed by Special Master Graves herein on July 26, 1937 and make and adopt each and all of the exceptions to said report heretofore filed in this cause on behalf of the Northern Pacific Railway Company and Northern Pacific Railroad Company, and the same are hereby referred to and made a part hereof by reference without setting them out verbatim herein. Each and all of the said exceptions should be granted.

2. The said report of Special Master Graves filed July 26, 1937, is further excepted to because Special Master Graves arbitrarily and without authority in effect reported, though rather indefinitely, as to points on disputes between the Northern Pacific Railroad Company and the Northern Pacific Railway Company raised in the Answer and cross bill of the railroad company heretofore

filed and the intervening petition of Charles E. Schmidt and others heretofore presented to the Court, which act and report of the said Special Master was without hearing or testimony directed thereto; the indefiniteness and the confusion of the report on these disputes, especially as to stating [932] in some places lands were the property of the railroad company, other of the railway company and other of the company, indicate that the Special Master so reported through inadvertence and this exception should be sustained.

Respectfully submitted,

THOMAS BOYLAN
Liberty Trust Building
Philadelphia, Pennsylvania
ROBERT L. EDMISTON
Title Building
Spokane, Washington
RAYMOND M. HUDSON
MINOR HUDSON
GEOFFREY CREYKE JR. H
Peoples Life Insurance Bldg.
Washington, D. C.
Attorneys for Petitioners and
Northern Pacific Railroad Co.

[933]

In the District Court of the United States for the Eastern District of Washington, Northern Division

In Equity No. E-4389

UNITED STATES OF AMERICA,
Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a corporation,
NORTHERN PACIFIC RAILROAD COMPANY, a corporation,
NORTHERN PACIFIC RAILROAD COMPANY, as reorganized in 1875,
NORTHWESTERN IMPROVEMENT COMPANY, a corporation,
BANKERS TRUST COMPANY, a corporation,
GUARANTY TRUST COMPANY, a corporation,
CITY BANK FARMERS TRUST COMPANY, a corporation,
Defendants.

ORDER DENYING LEAVE TO INTERVENE AND STRIKING ANSWER AND CROSS-BILL

On this day the motions of plaintiff and defendants Northern Pacific Railway Company, Northern Pacific Railroad Company, and Northwestern Improvement Company, to strike from the files the

document entitled, "Answer and Cross Bill of the Northern Pacific Railroad Company by Charles E. Schmidt and other minority stockholders of said Railroad Company", and the motion of said parties for leave to file and serve said document, having been heard, it is ordered that the motion of the plaintiff and of said defendants to strike said above described document from the files, be, and the same is hereby, granted, and the said motion for leave to file and serve said document be and the same is hereby denied.

The motion of Walter L. Haehnlen and others for leave to file intervening petition attached to said motion, have come on to be heard, it is ordered that the said motion be, and the [934] same is, hereby denied, and said petition of Charles E. Schmidt and other stockholders of the Northern Pacific Railroad Company to intervene on their own behalf and on behalf of all other stockholders similarly situated, be, and the same is hereby, stricken from this cause.

"Motion of the Northern Pacific Railroad Company by Charles E. Schmidt and others, minority stockholders, and of said Charles E. Schmidt and others, minority stockholders, petitioners, to construe, modify and/or amend the report of the Special Master Graves filed July 26, 1937", coming on to be heard, it is ordered that said motion be, and the same is hereby, denied.

That certain document entitled, "Joinder of the Northern Pacific Railroad Company by Charles E.

Schmidt and others, minority stockholders, and of said Charles E. Schmidt and others, minority stockholders, petitioners, in the two motions filed to re-refer the report to the Special Master", and that certain document entitled, "Exceptions of Northern Pacific Railroad Company by Charles E. Schmidt and others, minority stockholders, and of said Charles E. Schmidt and others, minority stockholders, petitioners, to the report of Special Master Graves filed July 26, 1937", having come on to be heard, it is ordered that the same be, and they are hereby, stricken from the files in this cause.

"Motion on behalf of the said Northern Pacific Railroad Company for an extension of time to file exceptions to the Special Master's Report filed July 26th, 1937", having come on to be heard, it is ordered that the same be, and it is hereby, stricken from the files in this cause.

It is further ordered, that this order shall be without prejudice to the right of said Charles E. Schmidt, George Landell, executor of E. A. Landell, deceased, Clarence Lobenthal, trustee of Bernard Lobenthal, and Walter L. Haehnlen, themselves or as representatives of other stockholders of said Northern Pacific Railroad Company, or of such other stockholders themselves, to assert [935] in any other proceeding any rights which they may have by reason of the matters and things alleged in said answer and cross-bill and in said intervening petition.

Exception is allowed the Petitioners in intervention to all of the rulings above.

Dated at Spokane, Washington, March 9, 1938.

J. STANLEY WEBSTER
District Judge

[Endorsed]: Filed March 9, 1938. [936]

[Title of District Court and Cause.]

PETITION AND MOTION OF THE NORTHERN PACIFIC RAILROAD COMPANY, BY CHARLES E. SCHMIDT AND OTHER MINORITY STOCKHOLDERS:

1. To review, revise and amend Decree or Order entered in this cause March 9th, 1938.

2. And to Amend at bar its cross-bill and Answer by making a part of the said cross-bill and Answer, the Intervening Petition of Charles E. Schmidt and others, filed January 31, 1938, in this cause, and thereby making all the allegations to the said intervening Petition additional allegations in and to the said Answer and Cross-Bill.

1st. Now come the Northern Pacific Railroad Company by Charles E. Schmidt, George Landell, Executor of E. A. Landell, deceased, Clarence Loebenthal, trustee of Bernard Loebenthal and Walter

L. Haehnlen, and moves the court to review, revise and amend the Decree or Order entered herein on March 9th, 1938, and for reasons therefor, adopt and make part hereof the Petition and Motion of Charles E. Schmidt and other intervening Petitioners to review, revise and amend this day filed in this cause, the same as if set out verbatim herein. [937]

2nd. Now comes The Northern Pacific Railroad Company by Charles E. Schmidt, George Landell, executor of E. A. Landell, deceased, Clarence Loebenthal, trustee of Bernard Loebenthal, and Walter L. Haehnlen, and petitions and moves the court to permit it to amend at bar, its cross-bill filed in this cause on September 3rd, 1937, by adopting and making a part thereof the Intervening Petition and all the allegations therein filed in this cause January 31st, 1938, by Charles E. Schmidt and other minority stockholders of the Northern Pacific Railroad Company, without having to rewrite the cross-bill and Intervening Petition, and refile same, but to simply make the amendment by reference thereto; that a proper decree be entered allowing the amendment at bar by such reference.

ROBERT L. EDMISTON,
THOMAS BOYLAN,
RAYMOND M. HUDSON,

Attorneys for Charles E. Schmidt and other Minority Stockholders of the Northern Pacific Railroad Co., Intervening Petitioners.

State of Washington,
County of Spokane—ss.

I, Thomas Boylan, being first duly sworn depose and state that I am one of counsel for the Petitioners in the above Petition and Motion, and I have read the said Petition and Motion, and the facts stated therein are true to the best of my knowledge, information and belief.

THOMAS BOYLAN.

Subscribed and sworn to before me this 10th day of March, 1938.

[Seal] JOHN H. ROCHE,
Notary Public in and for the State of Washington, residing at Spokane, Wash.

[Endorsed]: Filed March 11, 1938. [938]

[Title of District Court and Cause.]

PETITION AND MOTION OF CHARLES E. SCHMIDT AND OTHER MINORITY STOCKHOLDERS OF THE NORTHERN PACIFIC RAILROAD CO., INTERVENING PETITIONERS TO REVIEW, REVISE AND AMEND DECREE OR ORDER ENTERED IN THIS CAUSE ON MARCH 9, 1938.

Now comes Charles E. Schmidt, George Landell, Executor of E. A. Landell, deceased, Clarence Loebenthal, trustee of Bernard Loebenthal, and Walter

L. Haehnlen, intervening petitioners, on behalf of themselves and all other minority stockholders of the Northern Pacific Railroad Company, and petition and move the court to review, revise and amend the Decree or Order entered in this cause on March 9th, 1938, for reasons hereinafter set forth.

On July 26th, 1937, these petitioners had not become parties to the cause, nor had they filed any pleadings on behalf of the Northern Pacific Railroad Company, and were not given Notice of, or served with, a copy of the Report of Special Master F. H. Graves, filed July 26, 1937, but learning of same they did, on August 25th, 1937, file a Motion on behalf of the Northern Pacific Railroad Company to extend the time to file exceptions to the Special Master's Report of July 26th, 1937; no objection to, or Motion to strike this Motion, was filed by anyone, and before the Motion was heard the exceptions [939] were filed and the Motion having kept the time open, the Motion, under the rules and practice should have been granted.

On September 3, 1937, the Northern Pacific Railroad Company, by Charles E. Schmidt and other minority stockholders of said Railroad Company filed its answer and cross-bill, and the plaintiff on September 13, 1937, and the Northern Pacific Railway Company, the Northern Pacific Railroad Company, through the attorneys of the Northern Pacific Railway Company, and the Northwestern Improvement Company, filed respective motions to strike the said Answer and Cross-bill, but no Motion to dis-

miss the Answer and cross-bill has at any time been filed.

That these Intervening Petitioners on behalf of themselves and all other minority stockholders of the Railroad Company filed a Petition to Intervene in this cause on January 31, 1938, with a Motion for leave to Intervene, and served the Notice thereon, to which no objections or motions to strike have been filed.

On February 19th, 1938, the Northern Pacific Railroad Company by Charles E. Schmidt and other minority stockholders filed a Motion to construe, modify and/or amend the Report of the Special Master, which was to review questions of law arising on the face of the Report, to which no objections or motions to strike were filed. That on February 19th, 1938, the Northern Pacific Railroad Company, by Charles E. Schmidt and other minority stockholders, and Charles E. Schmidt and other minority stockholders as intervening petitioners, filed a joinder in two motions theretofore filed by the Railway Company to re-refer the Report to the Special Master to which joinder no objections or motions to strike were filed. That on February 19th, 1938, the Northern Pacific Railroad Company, by Charles E. Schmidt and other minority stockholders filed exceptions to the Report of Special Master F. H. Graves, filed July 26th, 1937, and Charles E. Schmidt and other minority stockholders, intervening petitioners, joined in said exceptions, and on [940] March 7th, 1938, the plaintiff filed a

Motion to Strike the exceptions but no other objections or motions to strike the exceptions were filed.

The exceptions were to review the report on questions of law arising on the face of the report.

In the latter part of February 1938, the Clerk of the Court sent to counsel in the cause, a notice stating,

> "Take Notice that the above-entitled case has been set for hearing in said court at Spokane, on March 7th, 1938, at 10 A. M. on exceptions to Master's Report, and Motion for leave to file intervening petition."

On March 7th, 1938, the court first heard arguments on the Answer and Cross-bill of the Northern Pacific Railroad Company filed by Charles E. Schmidt and others, and on the intervening Petition, and announced that the court would strike the said Answer and Cross-bill and the Motion for leave to file the intervening Petition, and then the Court stated that his decision would be without prejudice to any of the minority stockholders of the Northern Pacific Railroad Company to assert in this cause, or any other cause, any rights that they may have by reason of the matters and things alleged in the Answer and Cross-Bill of the Railroad Company, and the said Intervening Petition, and the court further stated, that he would put in the Decree that when the Court hereafter determines the amount of money, if any, that the United States is required to pay in this suit, a provision that the fund or amount

so found by the court, is due by the United States, shall not be paid by the United States to anyone until the court has determined whether or not the lands and property which the said funds represent, are the lands and properties of, and therefore the funds should be paid to, the Northern Pacific Railroad Company or the Northern Pacific Railway Company, and that the Northern Pacific Railroad Company, by Charles E. Schmidt and other minority stockholders, and the intervening petitioners, Charles E. Schmidt and all other minority stockholders of the Northern Pacific Railroad Company shall have been given an opportunity to present their contention and claims to the said property and money on behalf of the said Northern Pacific Railroad Company, and on behalf of the [941] Intervening Petitioners, and until a similar opportunity is given the Northern Pacific Railway Company. The court indicated that they would go in the Decree determining the amount due by the United States, if any, and counsel stated that they understood the court to have said that there be such provision in the decree on these motions, and counsel for the Railway Company stated it was agreeable to him for it to go into the Decree that was to be entered on the hearing on March 7th, 1938, and there was no objection by the Attorney for the Plaintiff, and the court stated it would be put in the Decree to be entered at this time, and counsel representing the Northern Pacific Railroad Company in the Answer and Cross-Bill, and represent-

ing the Intervening Petitioners accordingly drafted a form of Decree in accordance with the court's decision and statement and presented same. That attorneys for the Railway Company presented a Decree, to which the attorneys for the plaintiff agreed, leaving out the paragraph that there would be a determination by the Court as to the true and actual ownership of the lands and properties, and the money, which was to be paid to represent same.

Immediately after the conclusion of the argument on said motions on March 7th, 1938, the hearings were continued on various exceptions of various parties, and during the argument the following occurred as described in The Spokesman-Review of March 9th, 1938, thus:

> "Surprising observers who had not anticipated any immediate decisions in the government land grant case now being argued by federal and Northern Pacific counsel before Judge J. Stanley Webster in federal court, the judge yesterday afternoon overruled the special master and sustained the government in its first exception to the master's ruling.
>
> By his decision, Judge Webster returned to the government title to 315,000 acres of land in the Crow Indian reservation the master had given the railroad. He held with the government's contention that inasmuch as this land had been primarily excluded because it was Indian land and the railroad given land elsewhere in lieu of it, the railroad had no right to

later file upon it because the government bought it from the Indians.

Cite Court Decision

This point was argued for the government by Judge C. Crawford Biggs, former solicitor general of the United States. Yesterday morning Judge Webster halted him in the midst of his argument and called upon L. B. daPonte, chief counsel for the Northern Pacific, to argue for the railroad. Judge Biggs had cited three or four supreme court decisions in keeping with his argument. [942]

Mr. daPonte cited Judge Vandervanter, later United States Supreme court judge and an admitted land authority; Attorney General Wickersham, and several acts of the land department as authorities for the railroad's contention it was entitled to file upon the lands again when the government bought them from the Indians.

His Terms Terse.

Judge Webster then surprised his listeners by giving his decision immediately in a formal report and not at the conclusion of the arguments and taking the case under advisement.

In no uncertain terms he declared he did not care what Judge Vandervanter, Attorney Wickersham, or the land department had done, he was bound by the acts of the Supreme Court and the matter was clearly one of equity that was stated plainly in the original terms of the grant.

The grant itself specifically barred the railroad from filing on the Indian lands in question and the railroad was reimbursed with land elsewhere for that reason. Just because the government later decided to buy back these lands from the Indians and make them part of the public domain did not give the railroad the right to violate the terms of the grant and file upon them, he ruled.

Means $1,000,000 Loss

The railroad probably would not have filed upon these lands had there been rich lands elsewhere to satisfy their claims. But it delayed so long in filing upon all the lands entitled to it under the grant that good lands were not available in sufficient quantities to satisfy the grant so the company grabbed everything available, the records show."

The foregoing sustained the Twelfth exception of the plaintiff to the report of Special Master Graves, filed July 26, 1937, which ruling was not only erroneous but was injurious and prejudicial to the rights of the Intervening Petitioners and the Northern Pacific Railroad Company, and accordingly in the form of Decree drafted and submitted by Petitioners, there is a paragraph as follows:

"It is further ordered that the twelfth exception filed by the plaintiff to the Special Master's Report filed July 26th, 1937, be and

the same is hereby sustained and the Special Master's said report is to that extent modified."

The Court refused to sign the draft presented by Petitioners and refused to insert said paragraph in the Decree signed by the court.

Thereupon the Decree presented by the Railway Company and concurred in by the plaintiff, was entered on March 9th. [943]

The plaintiff filed by Stipulation, some amendments to the Bill on the 4th day of June 1931, and the cause was referred to Special Master Graves on May 24th, 1932, to Report on the pleas, Motions to Dismiss and other pleadings, and the Special Master filed his report on May 31st, 1933, to which exceptions were filed by both plaintiff and defendants, and no one knew, or could know, until after the Court settled the pleadings under the Report by the Decree of October 3, 1935, as amended by the Decree of January 29, 1936, whether or not the Attorney General would obey the mandate of Congress and put in issue the validity and legal sufficiency of the mortgages and foreclosure, and seek the settlement of the other disputes raised before the Joint Congressional Committee, and perform all the other duties required of him by the Act of June 25th, 1929, and the Acts therein referred to; the Attorney General did not comply with the mandate of Congress requiring him to prosecute and have determined the validity and

legal effect of the mortgages, foreclosures and ownership of the Railroad System, lands and property.

That the court can, and did once in this cause, properly and clearly preserve and reserve rights of litigants as shown by paragraphs 1 and 2 of Decree of January 29th, 1936, which are as follows:

> "1. All the exceptions of plaintiff and of defendants be and they hereby are overruled, except that there are reserved until the final hearing all questions with respect to the defenses of innocent purchasers for value interposed by the defendants Bankers Trust Company, as trustee, and City Bank Farmers Trust Company, as Trustee. [944]
>
> 2. The report of said Special Master be and hereby is adopted in its entirety, except for the matters reserved as just provided."

The Decree or Order of March 9th, 1937, should be reviewed, revised and amended:

1. The Court under misapprehension stated during argument that the Court and the Master had determined the validity of the mortgages. The Special Master in his First Report, which was confirmed by the Court stated on page 196, "The government neither by the Bill nor in argument is attempting to set aside the decrees of foreclosure or the sales had under those decrees."

There was no issue in the cause as to the validity of the mortgages or the foreclosure until the An-

swer of the Northern Pacific Railroad Company, by Charles E. Schmidt, filed September 3, 1937.

2. The Attorney General was not only derelict and violated the mandate [945] of Congress by failing to file and then prosecute a suit determining the validity of the mortgages and the title of the Railroad lands and property, but he has also now joined with and assisted, aided and abetted the Railway Company in preventing anyone else from having those questions and all other questions, raised in the Answer and Cross-bill and the Intervening Petition, determined by a court.

3. Motions to strike only go to the form of the pleading and not to the merits and the court cannot strike pleading on its own motion under the well established rules of pleading.

4. The contention that decision of the Answer and Cross-bill and the Intervening Petition would put too much work on this court, and the court did not know who would pay the cost, is utterly without merit as it is solely the function of Congress to determine how much work any court shall be required to do, and who shall pay the cost, and the court has no authority in the matter.

5. The clause beginning with the word "and" in the sixth line of the Decree of March 9th, 1938, is improper and erroneous and should be stricken out as the Motion mentioned had been abandoned by the Railroad Company by Charles E. Schmidt and counsel notified thereof, and the Motion was

not called up. The record shows that the Answer and Cross-bill was already filed and served, and it is well established by the decisions of the Federal Courts that a cross-bill can be filed without leave at any time before Final Decree, and the Motions of the parties to strike the cross-bill and answer estops them to contend that it was not filed.

6. The Decree violates the Cardinal Rule in not making the Decree clearly set forth what the court stated was its decision. The court stated that there would be a provision protecting the rights of the Northern Pacific Railroad Company, and of these intervening petitioners, and affording them an opportunity to be heard before the fund is distributed, whereas the decree fails to make any mention thereof; [946] The without prejudice clause that is inserted would be res adjudicata as to such a hearing in this court, as it uses the words, "in any other proceeding". When a suit is filed in equity, and in this case there is a cross-bill filed, and the defense is made that there is another remedy available, and the court sustains that defense without prejudice to the other proceeding, the rule is established by a long line of decisions that the decree become res adjudicata and the plaintiff could never come back into that court, or into equity in any court.

There is no reason or occasion why the court did not and cannot now make the decree clear and unequivocal on this point and fully preserve and pro-

tect the rights of the Northern Pacific Railroad Company and the Intervening Petitioners.

7. For the foregoing, and other reasons apparent on the face of the record the Decree or Order of March 9th, 1938, should be reviewed, revised and amended, and a Decree entered overruling all motions to strike, requiring Answers to the Cross-bill and Interrogatories, and permitting the filing of the Intervening Petition, the sustaining of the exceptions of the Northern Pacific Railroad Company, and the Intervening Petitioners, and granting their Motion to review, revise and modify the Report of Special Master Graves filed July 26, 1937, and granting the joinder of the Railroad Company and these Petitioners.

But, if the court refuses to do this, then the court should strike out the last clause of the first paragraph of the Decree or Order of March 9th, 1938, should clarify the last paragraph, so as to affirmatively grant and decree the Northern Pacific Railroad Company and the Intervening Petitioners an opportunity to present and have the proper determination of their rights and contentions set out in the cross-bill and intervening Petition at a later date in this court, after the court has established a fund.

The Decree is confusing and contradictory and does not preserve the rights of the Railroad Company and the intervening petitioners, as the court stated in its decision would be preserved. [947]

If the court should unfortunately pass away or resign, or move to the Circuit Court of Appeals before the fund is established, there would be nothing in the record requiring his successor to grant the Railroad Company and these intervening petitioners such a hearing and determination.

Wherefore these intervening petitioners pray that the foregoing petition and motion be granted, and they will ever pray.

ROBERT L. EDMISTON,
THOMAS BOYLAN,
RAYMOND M. HUDSON,

Attorneys for Charles E. Schmidt, and other Minority Stockholders of the Northern Pacific Railroad Co., Intervening Petitioners.

State of Washington,
County of Spokane—ss.

I, Thomas Boylan, being first duly sworn depose and state that I am one of counsel for the Petitioners in the above Petition and Motion, and I have read the said Petition and Motion, and the facts stated therein are true to the best of my knowledge, information and belief.

THOMAS BOYLAN.

Subscribed and sworn to before me this 10th day of March, 1938.

[Seal] JOHN H. ROCHE,

Notary Public in and for the State of Washington, residing at Spokane, Wash.

Copy rec'd Mch. 11—38.

F. J. McKEVITT,
Atty. for Trust Companies.

Copy received.

J. CRAWFORD BIGGS,
Atty. for Plf.

March 11, 1938.

[Endorsed]: Filed March 11, 1938. [948]

[Title of District and Cause.]

NOTICE.

To: L. B. daPonte, esq., Attorney for defendants and J. C. Biggs, esq., Attorney for Plaintiff.

Take Notice that we will call up Annexed Petition and Motion to rehear, before Judge Webster at 10:00 o'clock A. M., Monday, March 14th, 1938.

Dated this 11th day of March, 1938.

ROBERT L. EDMISTON,
RAYMOND M. HUDSON,

Of Attorneys for Charles E. Schmidt, and other Minority Stockholders of the Northern Pacific Railroad Co., Intervening Petitioners. [949]

[Title of District and Cause.]

MOTION OF NORTHERN PACIFIC RAILROAD COMPANY BY CHARLES E. SCHMIDT AND OTHERS, TO DISMISS THE ORIGINAL AND AMENDED BILL OF COMPLAINT HERETOFORE FILED IN THIS CAUSE.

Now comes the Northern Pacific Railroad Company by Charles E. Schmidt and others, and moves the court to dismiss the Original and Amended Bill of Complaint heretofore filed in this cause, for the following reasons:

1st. Because the Attorney General, in filing this cause in the name of the United States, failed to comply with, and violated the Mandate of Congress, as set out in the Act of June 25th, 1929.

2nd. Because the said Bill and Amended Bill of Complaint failed to put in issue, as required by said Act, whether or not the Northern Pacific Railroad Company, under the grants, could put more than one mortgage on the granted lands and properties.

3rd. Because the said Bill and Amended Bill of Complaint do not put in issue, as required by the said Act, the validity and legal effect of the foreclosures of any and all mortgages which the Northern Pacific Railroad Company claims to have placed on the granted land. [950]

4th. Because the said Bill and Amended Bill of Complaint, failed to put in issue as required by the last clause of section five (5) of said Act,

"and all other questions of law and fact presented to the joint congressional committee appointed under authority of the joint resolution of Congress of June 5, 1924 (Forty-third Statutes, page 461), notwithstanding that such matters may not be specifically mentioned in this enactment."

5th. For other grounds and reasons apparent on the face of the Bill and Amended Bil of Complaint.

Dated this 16th day of March, 1938.

ROBERT L. EDMISTON
THOMAS BOYLAN H
RAYMOND M. HUDSON
Attorneys for Charles E. Schmidt and other Minority Stockholders of the Northern Pacific Railroad Company, Intervening Petitioners.

Copy rec'd March 16, 1938.

J. C. BIGGS
Spec. Asst. to Atty. Gen'l
L. B. da Ponte

[Endorsed]: Filed March 17, 1938. [951]

In the District Court of the United States for the Eastern District of Washington, Northern Division

In Equity No. E-4389

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a corporation,
NORTHERN PACIFIC RAILROAD COMPANY, a corporation,
NORTHERN PACIFIC RAILROAD COMPANY, as reorganized in 1875,
NORTHWESTERN IMPROVEMENT COMPANY, a corporation,
BANKERS TRUST COMPANY, a corporation,
GUARANTY TRUST COMPANY, a corporation,
CITY BANK FARMERS TRUST COMPANY, a corporation,

Defendants.

ORDER

The motion entitled, "Motion of Northern Pacific Railroad Company by Charles E. Schmidt and others, to dismiss the original and amended bill of complaint heretofore filed in this cause", and the petition and motion, entitled, "Petition and motion of the Northern Pacific Railroad Company, by Charles E. Schmidt and others minority stockholders: 1. To review, revise and amend Decree or Order entered in this case March 9th, 1938. 2. And

to Amend at bar its cross-bill and Answer by making a part of the said Cross-bill and Answer, the Intervening Petition of Charles E. Schmidt and others, filed January 31, 1938, in this cause, and thereby making all the allegations to the said intervening Petition additional allegations in and to the said Answer and Cross-bill", and the petition and motion, entitled, "Petition and Motion of Charles E. Schmidt and other minority stockholders of the Northern Pacific Railroad Co., intervening petitioners to review, revise and amend decree or order entered in this cause [952] on March 9, 1938", having come on to be heard on March 17, 1938, and having been considered,

It is ordered that said motions and petitions and each of them be, and the same are hereby, denied, and said moving parties, and each of them, are hereby allowed an exception to the denial of each of said motions and petitions.

It is further ordered, that this Order shall be without prejudice to the right of said Charles E. Schmidt, George Landell, executor of E. A. Landell, deceased, Clarence Lobenthal, trustee of Bernard Lobenthal, and Walter L. Haehnlen, themselves or as representatives of other stockholders of said Northern Pacific Railroad Company, or of such other stockholders themselves to assert later in this cause, when the fund, if any, to be distributed by the United States, is established and fixed or in any other proceeding, any rights which they may have by reason of the matters and things

alleged in said answer and cross-bill and in said intervening petition.

Dated March 22, 1938.

J. STANLEY WEBSTER
District Judge

[Endorsed]: Filed March 22, 1938. [953]

In the District Court of the United States for the Eastern District of Washington, Northern Division

Equity 4389

UNITED STATES OF AMERICA,
Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a corporation,
NORTHERN PACIFIC RAILROAD COMPANY, a corporation,
NORTHERN PACIFIC RAILROAD COMPANY, as reorganized in 1875,
NORTHWESTERN IMPROVEMENT COMPANY, a corporation,
BANKERS TRUST COMPANY, a corporation,
GUARANTY TRUST COMPANY, a corporation,
CITY BANK FARMERS TRUST COMPANY, a corporation,
Defendants.

ORDER ON EXCEPTIONS TO MASTER'S REPORT

This cause came on to be further heard upon the Special Master's report filed therein the 26th day

of July, 1937, and the Exceptions filed thereto, and after hearing argument, it was ordered:

(1) That plaintiff's exception numbered XII (relating to the Absaroka and Bear Tooth Forests) be and the same is hereby sustained. To such ruling the defendants except, and their exceptions are allowed.

(2) That plaintiff's exceptions numbered XVI to XXVII, inclusive XXXVIII and XXXIX (relating to substitution of Base) be and the same are hereby sustained. To such ruling the defendants except, and their exceptions are allowed.

(3) That plaintiff's exceptions numbered XL, XLIV, XLVIII, and XLIX (relating to Availability of Withdrawn Lands for Indemnity Selections) be and the same are hereby sustained. To such ruling the defendants except, and their exceptions are allowed.

(4) That plaintiff's exceptions numbered LV and LVI (relating to 1641.27 acres in former Fort Ellis Military Reservation) be and the same are hereby sustained. To such ruling the defendants except, and their exceptions are allowed. [954]

(5) That plaintiff's exception numbered XLIII (relating to Availability of Withdrawn Lands) be and the same is hereby sustained, except that subdivisions (e), (f), and (g) and all of subdivision (h) thereof, with the exception of the items of 1600 acres and 2217 acres, are hereby overruled. Insofar as by said rulings the exception is sustained defendants except and their exceptions are

allowed, and insofar as by said rulings the exception is overruled, plaintiff excepts and its exceptions are allowed.

(6) That plaintiff's exceptions numbered I, II, IV and V, and subdivision (a) of exception numbered III (relating to Portage conflict) be and the same are hereby overruled. To such ruling the plaintiff excepts, and its exceptions are allowed.

Pending disposition of the amended motion to re-refer, ruling on subdivisions (b), (c) and (d) of exception numbered III is reserved.

(7) That plaintiff's exception numbered VI (relating to Quantity of Deficiency) be and the same is hereby overruled. To such ruling the plaintiff excepts, and its exceptions are allowed.

(8) That plaintiff's exceptions numbered VII to XI inclusive (relating to Agricultural Lands) be and the same are hereby overruled. To such ruling the plaintiff excepts, and its exceptions are allowed.

(9) That plaintiff's exceptions numbered XIII to XV inclusive (relating to Northern Cheyenne Indian Reservation) be and the same are hereby overruled. To such ruling the plaintiff excepts, and its exceptions are allowed.

(10) That plaintiff's exception numbered XLI be and the same is hereby overruled. To such ruling the plaintiff excepts, and its exceptions are allowed.

(11) That plaintiff's exception numbered XLII be and the same is hereby overruled. To such ruling

the plaintiff excepts, and its exceptions are allowed.

(12) That plaintiff's exception numbered XLV be and the same is [955] hereby overruled. To such ruling the plaintiff excepts, and its exceptions are allowed.

(13) The plaintiff's exceptions numbered XLVI be and the same is hereby overruled. To such ruling the plaintiff excepts, and its exceptions are allowed.

(14) That plaintiff's exception numbered XLVII be and the same is hereby overruled. To such ruling the plaintiff excepts, and its exceptions are allowed.

(15) That plaintiff's exception numbered L be and the same is hereby overruled. To such ruling the plaintiff excepts, and its exceptions are allowed.

(16) That plaintiff's exception numbered LII be and the same is hereby overruled. To such ruling the plaintiff excepts, and its exceptions are allowed.

(17) That plaintiff's exception numbered LIV (relating to Lands Patented to Homesteaders after withdrawal) be and the same is hereby overruled. To such ruling the plaintiff excepts, and its exceptions are allowed.

(18) That plaintiff's exception numbered LVII (relating to Authorization of Second Indemnity Limits) be and the same is hereby overruled. To such ruling the plaintiff excepts, and its exceptions are allowed.

(19) That plaintiff's exception numbered LVIII be and the same is hereby overruled. To such ruling the plaintiff excepts, and its exceptions are allowed.

(20) The exceptions of the plaintiff numbered LI and LIII having been withdrawn by the plaintiff, it is unnecessary to consider them.

(21) The exceptions of the plaintiff numbered XXVIII to XXXVII inclusive, remain undisposed of because, in view of the other rulings upon exceptions of the plaintiff relating to substitution of base, it is unnecessary to consider them.

(22) That defendants' exception numbered I be and the same is hereby overruled. To such ruling the defendants except, and their [956] exceptions are allowed.

(23) That defendants' exception numbered II be and the same is hereby overruled. To such ruling the defendants except, and their exceptions are allowed.

(24) That defendants' exception numbered III be and the same is hereby overruled. To such ruling the defendants except, and their exceptions are allowed.

(25) That defendants' exception numbered IV be and the same is hereby overruled. To such ruling the defendants except, and their exceptions are allowed.

(26) That defendants' supplemental exceptions numbered I be and the same is hereby sustained.

(27) That defendants' supplemental exception numbered II be and the same is hereby sustained.

It further appearing to the court that there are additional matters connected with such report of the Master, which are yet to be considered and

determined by the Court before the review of said report may be completed, and that for the purpose of completing the review of said report of the Master and in order to enter an order or decree of this Court upon such review as required by the Act of June 25, 1929, and from which order or decree an appeal is authorized by the Act of May 22, 1936, it is necessary that the Court make such Findings of Fact and Conclusions of Law as the Court's review of said Master's report may require;

It is ordered that the parties hereto submit to the Court their proposed Findings of Fact and Conclusions of Law, together with their suggested draft or drafts of such order or decree.

Dated this 22nd day of March, 1938.

J. STANLEY WEBSTER
District Judge

Approved as to form:

J. CRAWFORD BIGGS
E. E. DANLY
WALTER L. POPE
Solicitors for Plaintiff

L. B. daPONTE
D. R. FROST
F. J. McKEVITT
Solicitors for Defendants

[Endorsed]: Filed March 22, 1938. [957]

[Title of District Court and Cause.]

ASSIGNMENTS OF ERROR OF THE NORTHERN PACIFIC RAILROAD COMPANY BY CHARLES E. SCHMIDT AND OTHER MINORITY STOCKHOLDERS

Now comes the Northern Pacific Railroad Company by Charles E. Schmidt and other minority stockholders and makes, presents and files the following Assignments of Error on appeal.

I.

The Court erred in the Decree of May 24, 1932, by referring this cause on a Motion of the Railway Company and others (to which Motion the Railroad Company was not a party, though the Decree by mistake states it was on the Motion of the Northern Pacific Railroad Company) to the Special Master on the pleas, motions to dismiss and other pleadings as such reference was in violation of equity rule 59 as construed by In re Parker 283 Fed. 404 at 408, (4) III. (CCA-7), which reversed and cancelled such a reference; In re King 179 Fed. 694 (CCA-7), and In re Bartleson Co. 243 Fed. 1001 (D. C. Fla.), and as this decree was sustained by the decrees of October 3, 1935, as amended by the Decree of January 29, 1936 affirming the report of the Special Master under the decree of May 24, 1932, the court again erred. [958]

II.

Having thus erroneously granted the said refer-

ence, the court erred in the Decree of October 3, 1935, as amended January 29, 1936, by overruling Exception No. 1 filed for the Northern Pacific Railroad Company by attorneys for the Northern Pacific Railway Company to the first Report of the Special Master filed May 31, 1933, thus overruling the general motion to dismiss filed for the Northern Pacific Railroad Company by the attorneys for the Northern Pacific Railway Company. (Report, page 35).

III.

The Court erred in denying said general Motion to dismiss the Bill and Amended Bill, as the said Bill and Amended Bill did not put in issue the validity of the foreclosures of the mortgages claimed to have been executed by the Northern Pacific Railroad Company, which included the question or issue of the power of the Northern Pacific Railroad Company to place more than one mortgage on the lands granted, nor did the Bill or Amended Bill put in issue the other disputes mentioned in the last clause of Section 5 of the Act of June 25, 1929, which directed and made it mandatory on Attorney General to put in issue and to have determined by the court.

IV.

If the court held, as it now states it did, that the validity of the said mortgages was determined in confirming the first report of the Special Master, by the decree of Oct. 3, 1935 as amended Jan. 29,

1936, such ruling and determination was erroneous as the said validity of said mortgages was not pleaded, was not in issue, was not contested, and there was no evidence on the point, and the reference was on the pleading.

V.

Having thus erroneously granted the said reference, the court erred in the Decree of October 3, 1935, as amended January 29, 1936, by overruling Exception No. 2, filed for the Northern Pacific Railroad Company, by attorneys for the Northern Pacific Railway Company, to [959] the first Report of the Special Master filed May 31, 1933, thus holding that the plea of laches was not maintainable against the land grant. (Report, pages 36-37).

VI.

Having thus erroneously granted the said reference, the court erred in the Decree of October 3, 1935, as amended January 29, 1936, by overruling Exception No. 3, filed for the Northern Pacific Railroad Company by attorneys for the Northern Pacific Railway Company to the first Report of the Special Master filed May 31, 1933, thus overruling the plea of res adjudicata. (Report, page 38).

VII.

Having thus erroneously granted the said reference, the court erred in the Decree of October 3, 1935, as amended January 29, 1936, by overruling Exception No. 4, filed for the Northern Pacific Rail-

road Company by Attorneys for the Northern Pacific Railway Company to the first Report of the Special Master filed May 31, 1933. (Report page 95).

VIII.

The court erred in its decree of March 9, 1938, by denying the Motion of the Northern Pacific Railroad Company by Charles E. Schmidt and other minority stockholders, filed February 19, 1938, to construe, modify and amend the second report of the Special Master filed July 26, 1937, as the court thus left the Report confusing and contradictory as to the ownership of the Northern Pacific Railroad properties, lands and land grants, and the court further erred by refusing to construe and amend said report to make it state that title to and ownership of the Northern Pacific Railroad properties and lands and land grants were in the Northern Pacific Railroad Company, or to reserve the question of such title and ownership until it could be determined on the Answer and Cross-bill of the Northern Pacific Railroad Company filed by Charles E. Schmidt and [960] other minority stockholders, September 3, 1937, and or the Intervening Petition of Charles E. Schmidt and other minority stockholders filed January 31, 1938; the Masters Report indicates 34 plus, times that the property and lands belong to "the company" without indicating what company, 18-plus times to the Railway Company, and a number of times to the Railroad Company.

IX.

The Court also erred in its Decree of March 22nd, 1938, by denying the Petition and Motion to re-hear of the Northern Pacific Railroad Company by Charles E. Schmidt and other Minority Stockholders, filed March 11, 1938, on these points.

X.

The Court erred in its Decree of March 9, 1938, by striking the Answer and Cross-bill of the Northern Pacific Railroad Company by Charles E. Schmidt and other minority stockholders, filed September 3, 1937, as motions to strike go only to the form and not the merits, and the said Answer and Cross-Bill are perfect as to form, and no objection pointed out as to form; the Northern Pacific Railway Company filed a Motion to Strike the said Cross-bill and Answer, and plaintiff filed a Motion entitled, Motion to Strike, and asked that the Answer and Cross-bill be stricken, but it included a clause asking that Cross-bill be dismissed as it did not state a cause of action against the United States, but did not put up a defense of laches or any other specific defense.

XI.

The Court erred in its decree of March 22, 1938, by denying the Petition and Motion of the Northern Pacific Railroad Company to rehear the Decree of March 9, 1938, and to allow the Northern Pacific Railroad Company to amend at bar its cross-bill and answer by making the intervening Petition of Charles E. Schmidt and other minority stockholders,

and each of the allegations thereof, a part of the said cross-bill and Answer, as this would not have worked any [961] delay, the cross-bill and Answer had not been dismissed and the parties put out of court, but the cross-bill and Answer had only been stricken, and under the liberal rules of amending, the Railroad Company was entitled to amend as of right; there was no answer, plea or motion to strike or dismiss the said Petition and motion, or other objection thereto, filed, against the Motion to rehear and amend, and it was denied and not stricken; leave to amend was asked in Paragraph XXI, and others of cross-bill.

XII.

The Court erred in the Decree of March 9, 1938, by striking the joinder in the Motion of the Northern Pacific Railroad Company to re-refer the cause to the Special Master, which joinder was filed February 19th, 1938, as there was no Motion filed to strike the said joinder, (a) it was erroneous to strike it as the Northern Pacific Railroad Company is vitally interested in the report and having it properly completed by further reference, and (b) the Court cannot of its own motion, strike a pleading from the files as Motions to Strike go only to form.

XIII.

The Court erred in its decree of March 9, 1938, by striking the exceptions filed February 19, 1938, to report of July 26, 1937, by the Northern Pacific Railroad Company by Charles E. Schmidt and other

minority stockholders, as under the allegations of the Answer and Cross-bill which were not denied that ownership and title of the properties, lands and land grants of the Northern Pacific Railroad are in the Northern Pacific Railroad Company, and that the Northern Pacific Railway Company holding the Northern Pacific Railroad Company in captivity through the Northern Pacific Railway Company's Attorneys, filed a disclaimer of title and ownership of the Northern Pacific Railroad Company to the said property, lands and land grants, and was not properly representing, preserving or protecting the rights of the Northern Pacific Railroad Company;

The Court erred in its Decree of March 22, 1938, in denying the [962] Petition and Motion to rehear the Decree of March 9th, 1938, on the exceptions, as the allegations of the said Petition and Motion were not denied but admitted, and there was no Motion to Dismiss, strike or other objection filed against it, nor was there any denial of the allegations of the said Answer and Cross-Bill, and of the said Intervening Petition.

XIV.

The Court erred in its Decree of March 9th, 1938, in striking the Motion of the Northern Pacific Railroad Company for an extension of time to file exception to the Special Master's Report filed July 26th, 1937, as there was no Motion to Strike the said Motion to extend time, and the exceptions of the

Northern Pacific Railroad Company were filed on February 19th, 1938, prior to the hearing on the Motion to extend time; it is settled practice of the courts that when a Motion to Extend Time is filed for the performance of said Act, that if the Act is performed before the Motion is acted on, that the Motion to extend the time to the date of the actual filing will thereby, as a matter of course, be granted.

XV.

The Court erred in striking pleadings to which there were no Motions to Strike, thus holding that the court, of its own motion, can strike a pleading.

XVI.

As the Court gave as one reason for striking the Answer and Cross-bill of the Northern Pacific Railroad Company, by Charles E. Schmidt, and other minority stockholders, and for denying leave to file the Intervening Petition, that the court had by the Decree of October 3, 1935, as amended January 29, 1936, confirming the First Report of Special Master, held that the Mortgages claimed to have been executed by the Northern Pacific Railroad Company, were valid (and called upon the Special Master in Open [963] Court to confirm same) and as the Court thus erroneously construed and reviewed the decree of October 3, 1935, as amended January 29th, 1936, the Court erred in striking the said Answer and Cross-bill and in refusing leave to file said Intervening Petition, as a review and examination of the First Report of the Special Master

and the Decree of October 3, 1935, as amended January 29, 1936, confirming said report, will clearly demonstrate that the Court did not attempt to, nor in any manner, determine that said mortgages were valid.

XVII.

The Court erred in striking out the Cross-bill and Answer of the Northern Pacific Railroad Company by Charles E. Schmidt and other minority stockholders, as facts alleged therein, and admitted as true, show the title of the Northern Pacific Railroad Company properties, lands and land grants had never passed out of the Northern Pacific Railroad Company, and that the Northern Pacific Railway Company had been absorbed by or was owned by the Northern Pacific Railroad Company, and that the Northern Pacific Railway Company was never organized, and Acts purporting to amend its charter were void and unconstitutional, and all that the Northern Pacific Railway Company attempted to do was ultra vires and void; that further, because the Northern Pacific Railroad Company had no power under its Charter or laws to sell or convey its properties or lands, or to give a long time lease on same, and the Northern Pacific Railway Company under the laws of Wisconsin and the other states, traversed by the Northern Pacific Railroad system was not given authority or power to purchase, receive or have turned over to it by lease or other contract, the said Northern Pacific Railroad Company property.

XVIII.

The Court erred in stating and holding that laches prevented the Northern Pacific Railroad Company from seeking to prevent in this suit the Northern Pacific Railway Company from unlawfully seizing [964] and taking possession of lands under the land grant, or their value, which said land or land grants had not been heretofore seized or taken possession of or any title thereto given to the Northern Pacific Railway Company, and the same is not yet in its power or possession, and neither laches or the statute of limitations would begin to run until the Northern Pacific Railway Company actually obtained possession. The Court held this, notwithstanding the petitioners who filed an Answer and cross-bill began in 1897 and 1898, and have continued persistently to date to have the rights of the Northern Pacific Railroad Company determined and possession of its Railroad System land grants and property, title to which has never gone out to the Northern Pacific Railroad Company, restored to the Northern Pacific Railroad Company; and further, that the minority stockholders on behalf of themselves and petitioners, and aided by them on November 21st, 1900, instituted a suit in the Circuit Court of the United States in the Southern District of New York, seeking relief sought in the answer and cross-bill, which suit is still pending and undetermined, and was recently revived by the Court in the name of the Executor of the Plaintiff, and further these petitioners had since 1900 con-

tinuously sought a Congressional Investigation so as to obtain the facts set out in the Answer and Cross-bill and Intervening Petition, which were hidden and secreted by the Northern Pacific Railway Company, and other facts, which are still hidden and secreted by the Railway Company and Petitioners believe they can state, without fear of successful challenge, that but for the continuous acts and efforts of the Petitioners, the Joint Congressional Committee investigation of 1925, resulting in the Act of June 25, 1929, would never have been obtained, or the Act passed, or this suit authorized but for such efforts of the Petitioners and information they furnished the Government.

XIX.

The Court erred in its Decree of March 22nd, 1938, in denying on the merits, and not striking the Motion to Dismiss the Bill and [965] Amended Bill of Complaint, which Motion was filed by the Northern Pacific Railroad Company by Charles E. Schmidt and Minority Stockholders, March 17, 1938, and in not granting the Motion and giving leave to and requiring the plaintiff to file an Amended Bill putting in issue the validity of the foreclosure of the mortgages claimed to have been executed by the Railroad Company and the other matters required by the mandate of the Act of June 25, 1929, as set out in part in the said Motion, and as shown by the said Act.

XX.

The Court erred in holding that the United States was not estopped to object to or oppose the answer and cross-bill and the Motion to Amend same, or the intervening petition, or to move to strike or dismiss either because the Attorney General failed to put in issue or prosecute to determination the validity of the two foreclosures of the mortgages and the disputes set out in the last clause of Section 5 in the Act of June 25, 1929 (46 Stats. 41).

XXI.

The Court erred in holding that the Northern Pacific Railroad Company was not estopped to object to or oppose the Answer or Cross-bill, or Motion to Amend same, or the Intervening Petition, or move to strike either, because the Northern Pacific Railway Company illegally and unlawfully, without any power or authority under its Charter, or by any State Law to do so, had seized and is holding all of the property, lands and land-grants of the Railroad Company, except such as are involved in this suit and had unlawfully taken and placed the Northern Pacific Railroad Company in captivity under its domination and control, and while so illegally and unlawfully holding said Northern Pacific Railroad Company in such captivity, since 1897, the Northern Pacific Railway Company had filed, through its attorneys, a disclaimer of any claim or interest of the Northern Pacific Railroad Company in and to any properties, lands or land

grants under the Act of July 2, 1864, and the Northern Pacific Railway Company is now in this suit seeking to and [966] endeavoring to unlawfully and illegally seize and take possession of lands or their value, of the Northern Pacific Railroad Company, which the Northern Pacific Railway Company had not heretofore been able to seize and take possession of as is shown by the allegations of the Answer and Cross-bill and Intervening Petition, which allegations on the Motions are not denied, but admitted to be true.

XXII.

The Court erred in refusing to hold that as alleged in the Answer and Cross-Bill and Intervening Petition, and admitted, that when Congress passed the Act of June 25, 1929, it made it mandatory on the Attorney General, and the Court, to have determined in the suit under proper allegations in the Bill of Complaint, all the rights of the Northern Pacific Railroad Company, and the Northern Pacific Railway Company, as is shown by Chairman Colton's Report for the committee to the House, and as these matters were purposely left open for future determination by Act of July 1, 1898, (30 Stats. 620), and by the said Act Congress purposely agreed and gave its consent for the United States to be sued or to be a party to litigation between the Northern Pacific Railroad Company and the Northern Pacific Railway Company, as Congress construed the Act of July 2, 1864, and the Joint Resolution of May 31, 1870, to make it mandatory that

the United States be a party to all suits and litigations involving the land, land-grants and mortgages authorized thereunder, and that such rights could not be determined in any other litigation, as the United States could not be made a party to any other such litigation.

XXIII.

The Court erred in holding that it is now too late for the Answer and Cross-bill and Intervening Petition to be filed in this cause, notwithstanding it took the court, and parties, five years, six months and twenty-eight days from July 31, 1930 to January 29, 1936, to settle the pleadings, at a cost considerably in excess of $25,000.00, on January 29th, 1936, and until that time the minority stockholders [967] did not definitely know, and could not know, that the Attorney General, in dereliction of his duty, and the Mandate of Congress to him and the court, would ignore the mandatory direction of the Court requiring him to have all rights of the Northern Pacific Railroad Company and Northern Pacific Railway Company to the land, land grants and properties, and the validity of the foreclosure of the mortgages in 1875 and 1896 determined, and further, notwithstanding that the Northern Pacific Railway Company is now in this suit trying to illegally and unlawfully grab, take, seize and possess further and other lands, or their value of the Northern Pacific Railroad Company, while the Northern Pacific Railway Company holds the Northern Pacific Railroad Company in captivity.

XXIV.

The Court erred in stating in its decision that the Petitioners on behalf of the Northern Pacific Railway Company can come back into this cause to determine the ownership of the fund established after such fund is established, but refused to put in the Decree words confirming such decision, but used words which would be construed to create res adjudicata to further proceedings on behalf of the Northern Pacific Railroad Company in this cause, and in addition to that the court denied the Motion of the Northern Pacific Railroad Company to construe, modify and amend the Report of the Special Master filed July 26, 1937.

XXV.

The Court erred in sustaining the plaintiff's Exception numbered 12, involving Absaroka and Beartooth forest .

XXVI.

The court erred in sustaining plaintiff's Exceptions Nos. 16 to 27 inclusive, and Nos. 38 and 39, involving substitution of base.

XXVII.

The court erred in sustaining the plaintiff's Exception numbered 40, 43(a), (b), (d) and (e), 44, 48, and 49, involving the [968] availability of withdrawing lands for indemnity selection, and Nos. 55 and 56 involving Fort Ellis Military Reservation.

XXVIII.

The Court erred in overruling the Northern Pacific Railroad Company's Exception No. 1.

XXIX.

The Court erred in overruling the Northern Pacific Railroad Company's Exception No. 2, involving the Portland Oregon & Tacoma Washington overlap.

XXX.

The Court erred in overruling the Northern Pacific Railroad Company's Exception No. 3, involving losses in the Second Indemnity limits of a particular state.

XXXI.

The Court erred in overruling the Northern Pacific Railroad Company's Exception No. 4.

Dated this 22nd day of March, 1938.

ROBERT L. EDMISTON
THOMAS BOYLAN
RAYMOND M. HUDSON
MINOR HUDSON
GEOFFREY CREYKE, JR.

Attorneys for Chas. E. Schmidt and other minority stockholders of Northern Pacific Railroad Company, Intervening Petitioners.

[Endorsed]: Filed March 22, 1938. [969]

[Title of District Court and Cause.]

AMENDMENT TO ASSIGNMENTS OF ERROR.

Now Comes Northern Pacific Railroad Company by Charles E. Schmidt, et al, and amends its Assignment of Errors filed herein March 22nd, 1938,

by adding a new, No. 32, paragraph thereto, to-wit:

No. XXXII. The Court erred in the Orders of March 9th, 1938, and of March 22nd, 1938, in striking out the Answer and Cross-Bill, in not permitting the filing of the Intervention Petition, and in not requiring the Northern Pacific Railway Company and plaintiff to answer same, and in not requiring the Northern Pacific Railway Company to answer the Interrogatories and produce the papers and documents called for in the interrogatories, as this Appellant is entitled, and it is necessary for appellant in preparation for the hearing on the ownership of the funds and property to be established, to have said data and documents.

Dated this 25th day of March, 1938.

ROBERT L. EDMISTON
THOMAS BOYLAN
RAYMOND M. HUDSON
MINOR HUDSON
GEOFFREY CREYKE, JR.
Attys. for Charles E. Schmidt & other minority stockholders of Northern Pacific Railroad Company.

Service by.....copies hereof acknowledged this .....day of March, 1938.

.....
Of Attys. for Plaintiff-Appellee.

.....
Of Attys. for Defendants, Appellees.

[Endorsed]: Filed March 26, 1938. [970]

[Title of District Court and Cause.]

ASSIGNMENTS OF ERROR OF CHARLES E. SCHMIDT AND OTHER INTERVENING PETITIONERS.

Now comes Charles E. Schmidt, George Landell, executor of E. A. Landell, deceased, Clarence Loebenthal, trustee of Bernard Loebenthal, and Walter L. Haehnlen, on behalf of themselves and all other minority stockholders of the Northern Pacific Railroad Company, and present and file the following Assignment of Errors on Appeal.

I.

The Court erred in denying leave to file the Intervening Petition of these petitioners filed on January 31, 1938, as the said Petition stated a good cause of action is timely and sought relief and prevention of delivery to the Northern Pacific Railway Company, of lands or other value, which the said Northern Pacific Railroad Company had not taken possession of, but which it is seeking in this suit.

[971]

II.

These Petitioners adopt and make part of this Assignment of Errors, each and all the Assignments of Error filed by the Northern Pacific Railroad Company by Charles E. Schmidt, and other minority stockholders in this cause, this day, except Assignments of Error Number 10 and Number 11, and make such Assignments of Errors applicable to all pleadings filed by these petitioners.

Dated this 22nd day of March, 1938.

ROBERT L. EDMISTON
THOMAS BOYLAN
RAYMOND M. HUDSON
MINOR HUDSON
GEOFFREY CREYKE, JR.
Attorneys for Charles E. Schmidt and other Intervening Petitioners.

[Endorsed]: Filed March 22, 1938. [972]

United States of America,
Eastern District of Washington—ss.

I, A. A. LaFramboise, Clerk of the United States District Court in and for the Eastern District of Washington, do hereby certify that the annexed and foregoing is a true and correct copy of the original.

1. Bill of Complaint filed July 31, 1930, and Exhibits "M" and "N" to said Complaint.

2. Voluntary Appearance of Defendants filed September 10, 1930.

3. Appearance of Attorneys for Northern Pacific Railway Company filed December 5, 1930.

4. Stipulation of Amendments to Bill of Complaint filed June 25, 1931.

5. Order approving stipulation covering amendments filed June 25, 1931.

6. Amended and Supplemental Answer of Defendant Northern Pacific Railway Company filed July 18, 1931.

7. Request for hearing on points of law by Northern Pacific Railway Company and N. W. Improvement Company filed July 18, 1931.

8. Disclaimer of Northern Pacific Railroad Company filed January 18, 1932.

9. Plaintiff's motion to strike Disclaimer of Northern Pacific Railroad Company filed February 13, 1932.

10. Answer of Northern Pacific Railroad Company filed May 9, 1932.

11. Request for hearing on points of law by Northern Pacific Railroad Company filed May 9, 1932.

12. Order of reference to Special Master of May 24, 1932.

13. Special Master's first Report filed May 31, 1933.

14. Exceptions of Northern Pacific Railway Company, Northern Pacific Railroad Company and Northwestern Improvement Company filed June 20, 1933 to First Report of Special Master.

15. Plaintiff's exceptions filed July 8, 1933 to First Report of Special Master. [973]

16. Order of compensation to Special Master dated January 25, 1934.

17. Memorandum Opinion of Court on Exceptions to Special Master's First Report filed September 9, 1935.

18. Order pursuant to opinion on Exceptions to Special Master's First Report dated October 3, 1935.

19. Order of January 29, 1936 amending order dated October 3, 1935.

20. Order of April 21, 1936 for further reference to Special Master Graves.

21. Appearance of L. B. daPonte for Defendants Northern Pacific Railway Company, Northern Pacific Railroad Company and Northwestern Improvement Company filed July 22, 1937.

22. Special Master's Second Report filed July 26, 1937.

23. Exceptions of Defendants Northern Pacific Railway Company, Northern Pacific Railroad Company and Northwestern Improvement Company filed August 9, 1937 to the Master's Second Report.

24. Supplemental Exceptions of Defendants Northern Pacific Railway Company, Northern Pacific Railroad Company and Northwestern Improvement Company filed August 11, 1937 to Master's Second Report.

25. Plaintiff's Exceptions filed August 13, 1937 to Master's Second Report.

26. Motion of Minority Stockholders of Northern Pacific Railroad Company filed August 25, 1937 for extension of time to file Exceptions to Master's Second Report.

27. Answer and Cross Bill of Northern Pacific Railroad Company by Minority Stockholders filed September 3, 1937.

28. Plaintiff's Motion filed September 13, 1937 to Strike Answer and Cross Bill of Northern Pacific Railroad Company by Minority Stockholders.

29. Motion of Northern Pacific Railway Company, Northern Pacific Railroad Company and

Northwestern Improvement Company filed September 15, 1937 to Strike Answer and Cross Bill of Northern Pacific Railroad Company by Minority Stockholders.

30. Motion of Minority Stockholders of Northern Pacific [974] Railroad Company for leave to file Petition in intervention filed January 31, 1938.

31. Intervening Petition filed with said Motion January 31, 1938.

32. Appearance of counsel for Northern Pacific Railroad Company by Minority Stockholders filed February 14, 1938.

33. Appearance of counsel for Minority Stockholders as intervening Petitioners filed February 14, 1938.

34. Motion of Northern Pacific Railroad Company by Minority Stockholders to construe, modify and amend filed February 19, 1938, the Second Report of Special Master.

35. Exceptions filed February 19, 1938 of Northern Pacific Railroad Company by Minority Stockholders, and of Minority Stockholders—Intervening Petitioners—to Second report of Special Master.

36. Order of March 9, 1938 denying leave to intervene and striking Answer and Cross Bill of Northern Pacific Railroad Company by Minority Stockholders.

37. Petition of Northern Pacific Railroad Company by Minority Stockholders filed March 11, 1938 to review and amend order of March 9, 1938.

38. Petition of Minority Stockholders—Intervening Petitioners—filed March 11, 1938 to review and amend order of March 9, 1938.

39. Motion of Northern Pacific Railroad Company by Minority Stockholders filed March 17, 1938 to dismiss original and amended Bill of Complaint.

40. Order of March 22, 1938 denying petitions to review and amend order of—March 9, 1938.

41. Order of March 22, 1938, on Exceptions to Master's Second Report—sustaining some, denying others.

42. Assignment of Errors of Northern Pacific Railroad Company by Minority Stockholders filed March 22, 1938.

43. Amendment to Assignment of Errors of Northern Pacific Railroad Company by Minority Stockholders filed March 25, 1938.

44. Assignment of Errors of Minority Stockholders—Intervening [975] Petitioners filed March 22, 1938, as the same now remains on file and of record in my office at Spokane, Washington.

I further certify that the fees of the clerk of this court for preparing and certifying the foregoing typewritten copies amount to the sum of $132.00, and that the same have been paid in full by R. L. Edmiston, of attorneys for the intervening petitioners.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Spokane, Washington, this 4th day of August, A. D. 1938.

[Seal] A. A. LaFRAMBOISE,
Clerk [976]

[Title of District Court and Cause.]

ANSWER AND CROSS BILL OF THE NORTHERN PACIFIC RAILROAD COMPANY BY SCHMIDT AND OTHERS, MINORITY STOCKHOLDERS TO THE AMENDMENT TO THE AMENDED BILL OF THE PLAINTIFF FILED AUGUST 1, 1938.

Now comes the Northern Pacific Railroad Company by Charles E. Schmidt and others, minority stockholders, and for answer and by way of cross bill to the amendment to the amended bill of the plaintiff filed in this cause August 1, 1938, without waiving this defendant's motion to strike the said amendment to the amended bill of the plaintiff, which motion was filed August 29, 1938, but which is specifically reserved, ratified and insisted upon, and further without waiving this defendant's motion heretofore filed to dismiss the amended bill but specifically reserving, affirming and insisting on same, for answer says:

1. That the said amended bill of the plaintiff with the amendment should be dismissed, as it does not set forth a cause of action under the Act of June 25, 1929 and is in violation of said statute and should be dismissed.

2. Further answering the said amended bill with the amendment, these defendants deny that the monies and property mentioned [977] therein belong to the United States or to the Northern Pacific Railway Company but are the property and monies of the Northern Pacific Railroad Company.

3. For further answer to the said amended bill with the amendment, the answer and cross bill of the Northern Pacific Railroad Company by Charles E. Schmidt and others, minority stockholders filed in this cause September 3, 1937 be and the same is hereby referred to, adopted and made a part of this answer the same as if set out and reiterated herein verbatim.

4. For further answer to the said amended bill with the amendment, the intervening petition of Schmidt and others filed in this cause January 31, 1938 is referred to, adopted and made a part of this answer the same as if set out and reiterated herein verbatim; the said Northern Pacific Railroad Company by Schmidt and others, minority stockholders, having during the argument of this cause in March, 1938 asked leave to amend the said answer and cross bill of September 3, 1937 by making the said intervening petition a part thereof.

Wherefore, having fully answered the said amended bill with the amendment, the Northern Pacific Railroad Company by Charles E. Schmidt and others, minority stockholders, pray that the said amended bill with the amendment be dismissed and all the relief asked for therein denied. and that all the prayers of the answer and cross bill filed September 3, 1937 and the intervening petition filed January 31, 1938 and the interrogatories attached to and filed with the said intervening petition January 31, 1938, are hereby referred to, adopted, ratified and made a part of the prayers of this answer

and cross bill the same as if set out and reiterated herein verbatim; and it is further prayed that [978] the parties named therein be required to answer the same as directed in the said answer and cross bill, intervening petition and interrogatories.

WALTER L. HAEHNLEN
CHARLES E. SCHMIDT
GEORGE LANDELL,
Executor of E. A. Landell
CLARENCE LOEBENTHAL
Trustee of Bernard Loebenthal

THOMAS BOYLAN
Liberty Trust Building
Philadelphia, Pennsylvania.
ROBERT L. EDMISTON
Title Building
Spokane, Washington.
RAYMOND M. HUDSON
MINOR HUDSON
GEOFFREY CREYKE, JR.
Peoples Life Insurance Bldg.
Washington, D. C.
Attorneys for Minority Stockholders of N. P. R. R. Co.

State of Pennsylvania
County of Philadelphia—ss:

I, Clarence Loebenthal, being first duly sworn, depose and state that I am one of the minority stockholders mentioned in the answer and cross bill filed September 3, 1937, in this cause and I hereby cer-

tify that the facts and statements set forth in the foregoing answer and cross bill are true to the best of my knowledge, information and belief.

CLARENCE LOEBENTHAL [979]

Subscribed and sworn to and given under my hand and official seal this the 31st day of August, 1938.

[Seal] CLAUDE E. FRENCH
Notary Public, State of Pennsylvania, County of Philadelphia.
Notary Public.

My Commission expires April 8, 1941.

[Endorsed]: Filed Sept. 3, 1938. [980]

[Title of District Court and Cause.]

RETURN OF SERVICE

State of Washington
County of Spokane—ss.

Robert L. Edmiston being duly sworn on oath says; affiant is one of the Attorneys of record for the above named defendant, Northern Pacific Railroad Company, by Charles E. Schmidt and others, minority stockholders of the Northern Pacific Railroad Company.

That affiant served Answer and Cross-bill of said Northern Pacific Railroad Company by minority stockholders hereto attached, on the defendants and each of them named in said answer and cross-bill, by delivering two true copies thereof at the office of Francis J. McKevitt, Attorney of Record for said

defendants and each of them, in the First National Bank Building, in the city and county of Spokane, State of Washington, by delivering to and leaving the same with Inga Quesset, the Secretary and Stenographer of the said Francis J. McKevitt, in charge of his said office, the said copies for the said Francis J. McKevitt, he being absent therefrom and absent from the city and county of Spokane. The said Inga Quesset being in charge of said office as said Secretary and Stenographer, on this the 3rd day of September, A. D. 1938.

That affiant served said Answer and Cross-bill upon the above named plaintiff, United States of America, by delivering to and leaving at the office of Sam M. Driver, attorney of record for said plaintiff, a copy of said answer and cross bill, in the city and county of Spokane, on the 3rd day of September, A. D. 1938, by delivery to L. Keith, assistant to said Sam M. Driver, in charge of his office.

ROBERT L. EDMISTON

Subscribed and sworn to before me this 3rd day of September, 1938.

[Seal] ALBERT H. SUNDAHL

Notary Public in and for the State of Washington, residing at Spokane, Wash. [981]

CERTIFIED COPY

United States of America
Eastern District of Washington—ss:

I, A. A. LaFramboise, Clerk of the United States District Court in and for the Eastern District of Washington, do hereby certify that the annexed and foregoing is a true and full copy of the original Answer and Cross Bill of the Northern Pacific Railroad Company by Schmidt and Others, Minority Stockholders to the Amendment to the Amended Bill of the Plaintiff Filed August 1, 1938, together with Return of Service of Said Answer, both filed September 3, 1938, in cause entitled U. S. A. vs. N. P. Ry. Co., a corporation, et al, No. E-4389, now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Spokane this 3d day of September, A. D. 1938.

[Seal] A. A. LaFRAMBOISE
Clerk.

By E. L. COLBY
Deputy Clerk.

[Endorsed]: Filed in the U. S. District Court Sept. 3, 1938.

[Endorsed]: Filed U. S. C. C. A. Sept. 6, 1938.

[982]

[Title of District Court and Cause.]

APPEAL PETITION OF INTERVENING PETITIONERS TO UNITED STATES CIRCUIT COURT OF APPEALS FOR NINTH CIRCUIT.

To The Honorable J. Stanley Webster, Judge of the District Court of the United States for the Eastern District of Washington, Northern Division.

Your petitioners, Charles E. Schmidt, George Landell, executor of E. A. Landell, deceased, Clarence Loebenthal, trustee of Bernard Loebenthal, and Walter L. Haehnlen, on behalf of themselves and other Minority Stockholders of the Northern Pacific Railroad Company, intervening Petitioners in the above entitled cause, respectfully represent and show that in said cause pending in the District Court of the United States for the Eastern District of Washington, Northern Division, there was entered on the 24th day of May, 1932, an Order referring the cause to a Special Master, and an Order was entered on October 3, 1935, and Amended January 29th, 1936, confirming the Report of the said Special Master under the Decree of May 24th, 1932.

That on March 9th, 1938, an Order was entered denying (among other things) the Motions of the Northern Pacific Railroad Company and petitioners, to construe, modify and amend the Report of the [983] Special Master, filed July 26th, 1937, under the Order of Reference of April 21, 1936, and strik-

ing out the exceptions of the Railroad Company to said Report.

That on March 22, 1938, Orders were entered overruling, among other things, exceptions to the said Report of the Special Master, filed July 26, 1937, denying a Motion to Dismiss and a Petition to Rehear, and sustaining exceptions of the Plaintiff to said Report. Each of which Orders is greatly to the prejudice and injury of your Petitioners, and is erroneous and inequitable, and same and each of them are now there appealed from to the United States Circuit Court of Appeals, Ninth Circuit, at San Francisco, California.

Wherefore in Order that your Petitioners may obtain relief in the premises and have opportunity to show the errors complained of, your petitioners pray that they may be allowed to appeal from each of said orders or decrees in said cause to the United States Circuit Court of Appeals for Ninth Circuit, at San Francisco, California, agreeable to the statutes and rules of the Court in such case made and provided, and that proper orders touching the security required of them be made.

Dated this 24 day of May, 1938.

ROBERT L. EDMISTON
THOMAS BOYLAN
RAYMOND M. HUDSON
MINOR HUDSON
GEOFFREY CREYKE, JR.
Attorneys for Petitioners
Charles E. Schmidt and others.

Appeal allowed upon giving bond as required by law in the sum of $500.00.

.....

Judge.

Due and timely service of the foregoing Petition by receipt of a true copy thereof acknowledged this .....day of May, 1938.

.....

Attorneys for Plaintiff, appellee.

.....

Attorneys for Defendant, appellees.

[Endorsed]: Filed May 24, 1938. [984]

[Title of District Court and Cause.]

INTERVENERS' ASSIGNMENTS OF ERROR

Now comes intervening defendants Charles E. Schmidt, George Landell, executor of E. A. Landell, deceased, Clarence Loebenthal, trustee of Bernard Loebenthal, and Walter L. Haehnlen, minority stockholders, on behalf of themselves and all other minority stockholders of the Northern Pacific Railroad Company, and present and file the following Assignment of Errors on Appeal.

I.

The Court erred in denying leave to file the intervening Petition of these petitioners filed on January 31, 1938, as the said Petition stated a good cause of action is timely and sought, among other

things, relief and prevention of delivery to the Northern Pacific Railway Company of lands or other value, which the said Northern Pacific Railway Company had not taken possession of, but which it is seeking in this suit.

II.

These Petitioners adopt and make part of this Assignment of errors, each and all the Assignments of Error filed by the Northern Pacific Railroad Company by Charles E. Schmidt, and other minority stockholders in this cause, this day, except Assignments of Error Number 10 and number 11, and make such Assignments of Errors applicable to all pleadings filed by these petitioners.

Dated this 24th day of May, 1938.

ROBERT L. EDMISTON
THOMAS BOYLAN
RAYMOND M. HUDSON
MINOR HUDSON
GEOFFREY CREYKE, JR.
Attorneys for Charles E. Schmidt and other Intervening Petitioners.

Due service of the foregoing Assignment of Errors, and receipt of ..... copies thereof, is hereby acknowledged this ..... day of May, A. D. 1938.

.....

Attorney of record for Appellee, Plaintiffs
Attorney of record for the said Appellee, Defendants.

CERTIFIED COPY

United States of America,
Eastern District of Washington.—ss.

I, A. A. LaFramboise, Clerk of the United States District Court in and for the Eastern District of Washington, do hereby certify that the annexed and foregoing is a true and full copy of the original Appeal Petition of Intervening Petitioners to the United States Circuit Court of Appeals for Ninth Circuit (filed May 24, 1938), Interveners' Assignments of Error (filed May 24, 1938), Assignments of Error of the Northern Pacific Railroad Company by Charles E. Schmidt and Other Minority Stockholders on Appeal to United States Circuit Court of Appeals for the Ninth Circuit (filed May 24, 1938), and Order Denying Appeal of Intervening Northern Pacific Railroad Company, Minority Stockholders to United States Circuit Court of Appeals, Ninth Circuit (filed June 1, 1938), in cause entitled United States of America, Plaintiff, vs. Northern Pacific Railway Company, a corporation, et al, Defendants, Northern Pacific Railroad Company by Charles E. Schmidt and other Minority Stockholders, Appellants, Charles E. Schmidt, et al, Intervenors, Appellants, No. E-4389, now remaining among the records of the said Court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the afore-

said Court at Spokane this 2d day of June, A. D. 1938.

[Seal] A. A. LaFRAMBOISE,
Clerk

By.....
Deputy Clerk

[Endorsed]: Filed in the U. S. District Court May 24, 1938.

[Endorsed]: Filed U. S. C. C. A. June 4, 1938.

[Title of District Court and Cause.]

STIPULATION RELATIVE TO DEFENDANTS' MOTION TO RE-REFER AND AMENDMENT TO BILL OF COMPLAINT

It is stipulated between counsel for the respective parties as follows:

I.

That, pursuant to defendants' motion to re-refer for making certain proof concerning non-coal and non-iron character of lands selected with Portage base held invalid by the court, such proof may be made by the affidavit of Verner A. Gilles, copy of which shall be received in evidence as a part of the record in this cause and plaintiff will not question the sufficiency nor controvert such proof of non-coal and non-iron character of said lands.

II.

It is further stipulated that the amended complaint may be treated and considered as further amended as follows:

First: By inserting therein following subdivision XXV a new and additional subdivision to be designated subdivision "XXV A" reading as follows:

"That on May 7, 1868, a reservation was created in the then Territory of Montana for the Crow Indians; that thereafter, to-wit, on June 27, 1881, while said Indian Reservation was in full force and effect a portion of the route of the Northern Pacific Railroad in Montana was definitely located through said Reservation; that the lands within said reservation and embraced within the primary limits of the grant to said Northern Pacific Railroad Company were, under the provisions of the granting act, excepted from said grant; that thereafter, to-wit, on April 11, 1882, a part of the lands within said Reservation were purchased by the plaintiff from the Indians and said lands were ceded by said Indians to the United States; that thereafter the Northern Pacific Railway Company filed selection lists in plaintiff's Land Offices, thereby selecting 67,675.49 acres of the land so purchased by the plaintiff and within said primary limits, assigning as base for the selection of such lands other lands within the primary limits of the grant which were found to be mineral in character and were therefore excepted from the grant; the numerical descriptions of the lands so selected are set forth in tabulations hereto attached and marked Exhibits FF1 and FF2; that thereafter the offi-

cers and agents of the Interior Department of the United States, without any authority of law so to do, and through inadvertence, error and mistake, erroneously issued and delivered to the said Railway Company patents covering 63,-295.02 acres of the land so selected, leaving unpatented 4,380.47 acres of said selected lands; that the execution and delivery of said patents were without any authority of law and said patents were and are void, all of which was at all times known to said Companies; that upon the issuance by the United States of the said patents, and by virtue thereof, the said Railway Company assumed the complete ownership of said lands, including the right of possession thereof and all the rights usually attaching to ownership of such lands; that notwithstanding the said patented lands and each and all of them were erroneously and wrongfully obtained from the United States by said Railway Company as herein alleged, said lands have never been reconveyed to the plaintiff herein but on the contrary extensive areas of said lands have been sold to third persons; that large sums of money have been received by the said Railway Company through sales and leases of said lands, all of which moneys, together with interest thereon, rightfully belong to the United States."

Second: By inserting in the prayer of said amended bill of complaint following paragraph (4) thereof on page 99 a new and additional paragraph to be designated "4a" and reading as follows:

"That in the adjustment of said grants the defendant Northern Pacific Railway Company be required to account to the plaintiff for the moneys and other values received by it from such of the patented lands referred to in subdivision XXV A of this amended bill as have been sold or disposed of by said Company, together with interest thereon from the respective dates of the receipt of such moneys or values; that said Company be required to account to the plaintiff for the value of such of said patented lands as have not been sold or disposed of by it together with the rental value thereof since said lands were patented to said Company; that plaintiff be adjudged to be the owner of the unpatented lands referred to in Subdivision XXV A, freed of any claim of the defendants thereto; and that the selection lists by which said Company has attempted to select said lands be declared void and that they be cancelled."

III.

It is further stipulated that plaintiff may withdraw from the concession which it made during the argument before the Master that certain lands embraced within the area of the Ainsworth and Portland Terminal errors and for which the plaintiff had theretofore asked compensation, might be charged to the grant and that plaintiff may be in the same position it would have been with respect to such lands had that concession not been made.

IV.

It is further stipulated that plaintiff may prove the numerical descriptions of the lands involved in the Ainsworth and Portland Terminal errors and the Crow restoration lands by the introduction of evidence in the following manner: A tabulation of the lands which are referred to in this stipulation will be presented by plaintiff to defendants for examination and if found correct will be received in evidence without the necessity of producing any witness to testify thereto. It is further understood that at such time as the parties shall be able to do so they shall present this stipulation to the court and the questions for decision mentioned in paragraphs II and III will be presented and disposed of as the court shall determine.

V.

It is further stipulated that defendants may amend their answer, if so advised, and offer such evidence on the issues made by Paragraphs II, III and IV of the stipulation as they may be advised is appropriate thereto, and plaintiff may, if so advised, offer rebuttal evidence.

Dated July 22, 1938.

WALTER L. POPE (D)
E. E. DANLY
Solicitors for Plaintiff

L. B. DaPONTE
D. R. FROST
F. J. McKEVITT
Solicitors for Defendants

[Endorsed]: Filed July 26, 1938.

[Title of District Court and Cause.]

ORDER ON STIPULATION RELATIVE TO DEFENDANTS' MOTION TO RE-REFER AND AMENDMENT TO BILL OF COMPLAINT

Upon consideration of stipulation of counsel dated July 22, 1938, it is ordered that the same be and is hereby approved, that the affidavit of Verner A. Gilles is received in evidence and made a part of the record in this cause, that the complaint may be amended as provided in said stipulation, that the plaintiff may withdraw from the concession referred to in said stipulation, and that said stipulation may govern the further proceedings in this cause as therein provided.

Dated Aug. 1st, 1938.

J. STANLEY WEBSTER
District Judge

Approved as to form:

.....

.....

Solicitors for Plaintiff
L. B. DaPONTE
F. J. McKEVITT
Solicitors for Defendants

[Endorsed]: Filed Aug. 1, 1938.

CERTIFIED COPY

United States of America,
Eastern District of Washington—ss.

I, A. A. LaFramboise, Clerk of the United States District Court in and for the Eastern District of Washington, do hereby certify that the annexed and foregoing is a true and full copy of the original Stipulation Relative to Defendants' Motion to Re-refer and Amendment to Bill of Complaint, filed July 26, 1938, and Order On Stipulation Relative to Defendants' Motion to Re-refer and Amendment to Bill of Complaint, signed and filed August 1, 1938, in cause entitled United States of America, Plaintiff, vs. Northern Pacific Railway Company, a corporation, et al, Defendants, No. E-4389, now remaining among the records of the said Court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Spokane this 17th day of August, A. D. 1938.

[Seal] A. A. LaFRAMBOISE,
Clerk

By E. L. COLBY,
Deputy Clerk

[Endorsed]: Filed U. S. C. C. A. Aug. 18, 1938.

[Title of District Court and Cause.]

MOTION TO STRIKE OUT STIPULATION, AMENDMENT TO AMENDED BILL AND PRAYER, AND TO VACATE AND MODIFY THE DECREE OF AUGUST 1, 1938.

1. Now comes the Northern Pacific Railroad Company by Charles E. Schmidt and others, minority stockholders, and now also come Charles E. Schmidt and others, minority stockholders of the Northern Pacific Railroad Company, intervening petitioners, and move the Court to strike out the stipulation dated July 22, 1938 and approved by the decree of August 1, 1938, for reasons hereinafter set out.

2. Now comes the Northern Pacific Railroad Company by Charles E. Schmidt and others, minority stockholders, and now also come Charles E. Schmidt and others, minority stockholders of the Northern Pacific Railroad Company, intervening petitioners, and move the Court to strike out, for the reasons hereinafter set out, the amendment to the complaint set out in the said stipulation and allowed by the decree of August 1, 1938, which said proposed amendment added Subdivision "XXV A" immediately following Subdivision "XXV" of the amended bill and amended the prayers of the amended bill of complaint by adding a paragraph and prayer designated "4a" after paragraph 4.

3. That the decree of August 1, 1938 be vacated and modified for the reasons hereinafter set out.

The Government should not be permitted to amend the bill and prayers until and unless it so amends the bill to comply with the mandate of the statute and put in issue the validity of the foreclosures of the mortgages and all the other issues before the Joint Congressional Committee and other issues set out in Section 5 of the Act of June 25, 1929 (46 Stats. 41, U. S. Code Title 43, sections 921-929), all of which has heretofore been presented to and urged on the Court by these Movants in their motions, cross bill and other pleadings and in the intervening petition.

The Government at the request of these Movants had promised to furnish these Movants with a copy of the proposed amendment to the amended bill of complaint in time for these Movants to file objections and a date then be fixed for the argument of same, but as shown by the following correspondence between Assistant Attorney General Carl McFarland and his assistants and the counsel for these Movants, said amendment was mailed July 28, 1938 from Missoula, Montana but before or on the day it reached attorneys for these Movants in Washington, D. C., the decree of August 1, 1938 was entered. The correspondence is as follows:

"April 11, 1938.

United States vs. Northern Pacific Railroad Company, et als., No. E-4389 U. S. District Court, Spokane.

Hon. Homer Cummings,
Attorney General of the United States,
Washington, D. C.

My dear Mr. Cummings:

In behalf of the Northern Pacific Railroad Company by Charles E. Schmidt and others, non-assenting and minority stockholders, we are calling upon you to rectify the bill and amended bill of complaint in the above suit to make them comply with the mandate of the Statute of June 25, 1929 (46 Stats. 41).

We realize that the bill and amended bill were drafted and filed by a former Attorney General but the pleadings were not closed until the decree of October 3, 1935, as amended by the decree of January 29, 1936, overruling and sustaining motions to dismiss various paragraphs of the bill and overruling and sustaining various pleas. Section 5 of the Act of June 25, 1929 authorizes and directs the Attorney General to execute and prosecute a suit to have determined, among other things, 'the legal effect of the foreclosure of any and all mortgages which said Northern Pacific Railroad Company claims to have placed upon the said granted land by virtue of the authority conferred in said resolution of May 31, 1870.'

This logically includes the validity of the mortgages and the title under the alleged so-called foreclosure of 1896. The bill and amended bill do not raise these issues or seek to have these matters determined and Special Master Graves in his first report states: 'The Government neither by the bill nor in argument is attempting to set aside the decrees of foreclosure or the sales under those decrees.' In two prayers of the bill judgment is asked against the railway company and not against the railroad company and nowhere is judgment asked against the railroad company.

Thus the bill assumes and withdraws from consideration and determination the question of title and ownership of the land grants as between the railroad company and the railway company, which we think is clearly contrary to the mandate of the Act of June 25, 1929.

Thanking you in advance for due and proper consideration of this matter and a rectification thereof, we are

Cordially yours,
ROBERT L. EDMISTON,
THOMAS BOYLAN,
HUDSON, CREYKE & HUDSON,
By RAYMOND M. HUDSON.

RMH:S

CC: L. B. daPonte, Esq., General Counsel, Northern Pacific Railway Company, St. Paul, Minnesota''.

"Department of Justice
Washington, D. C.

April 16, 1938.

Messrs. Hudson, Creyke & Hudson,
Attorneys at Law,
404-8 Peoples Life Insurance Building,
1343 H Street, N. W.
Washington, D. C.

Sirs:

I am in receipt of your letter of April 11, 1938 asking me to amend the bill of complaint in the case of United States v. Northern Pacific Railway Company et al., No. E-4389 pending in the District Court of the United States for the Eastern District of Washington.

I do not agree with your contention that the allegations contained in said bill do not comply with the requirements of the Act of June 25, 1929 (46 Stats. 41). I must, therefore, decline to grant your request.

Respectfully,
For the Attorney General,
(s) CARL McFARLAND,
Assistant Attorney General."

"July 7, 1938.

United States v. Northern Pacific
No. E 4389 DCED Washington

Carl McFarland, Esq.
Department of Justice
City.

My dear Mr. McFarland:

Referring to yours of April 14, 1938 wherein you promised to furnish us with a copy of the proposed findings of facts and conclusions of law and the decree thereon in the above suit, we are wondering whether or not they are now available.

As about last October or November the Government gave notice that it would apply for leave to file an amended bill or an amendmnt to its bill and some six weeks ago Mr. Biggs stated that he expected shortly to ask for leave to file same, we are now asking that we be supplied with a copy of the proposed amendment or amended bill and notice of when the same will be presented to the Court.

Thanking you in advance, we are,

Yours very truly,

HUDSON, CREYKE & HUDSON,

RMH:S

By (s) RAYMOND M. HUDSON"

"Department of Justice
Washington, D. C.

July 12, 1938.

Messrs. Hudson, Creyke & Hudson,
404-8 Peoples Life Insurance Building
Washington, D. C.

Sirs:

Re: Northern Pacific land-grant case

This will acknowledge receipt of your letter of July 7, 1938. Owing to the illness of Judge Webster the signing of the decree in the above suit has been delayed. We hope to get the decree signed early in August.

Mr. Danly is now in Missoula, Montana, working in conjunction with Mr. Walter L. Pope in preparing findings of fact and conclusions of law and a form of decree.

The amendment to the bill has to do mainly with lands in the place limits of the grant which were in the Crow Indian Reservation, and have been patented to the company upon mineral base or have been selected by the company with mineral base assigned. This will be presented to the Court at the time of the hearing for entering the final decree. Judge Webster will be away from home during July and the date for hearing has not yet been fixed. I shall ask Mr. Danly to send you a copy of the proposed amendment.

Respectfully,
For the Attorney General,
(s) CARL McFARLAND,
Assistant Attorney General.

"July 18, 1938

United States v. Northern Pacific
No. E 4389 DCED Washington
CEC 174844

Carl McFarland, Esq.
Assistant Attorney General
Department of Justice
Washington, D. C.

My dear Mr. McFarland:

We wish to thank you for yours of the 12th in the above case, promising to send us a copy of the proposed amended bill or amendment to the bill, and to state that we will appreciate it if you will have this amendment and copy of the proposed decree and findings of fact sent a sufficient time before the date of presentation to enable us to file objections which we deem proper and to be present when the same is presented.

Thanking you in advance, we are

Yours very truly,
HUDSON, CREYKE & HUDSON,
RMH:S
By (s) RAYMOND M. HUDSON"

"Department of Justice
First National Bank Building
Missoula, Montana

July 28, 1938

Hudson, Creyke & Hudson,
Attorneys at Law
404-8 Peoples Life Insurance Bldg.
1343 H Street, N. W.
Washington, D. C.

Gentlemen:

A copy of your letter of July 18, 1938, addressed to Mr. Carl McFarland, Assistant Attorney General, has been forwarded to me here at Missoula.

Complying with your request that you be sent a copy of the proposed amendment to the bill of complaint, I am enclosing herewith copy of a stipulation which has been entered into by counsel for the Government and counsel for defendants and which contains the proposed amendment. The procedure outlined in the stipulation is, of course, subject to approval by the court. Mr. daPonte has sent the stipulation to Mr. McKevitt at Spokane for filing and has transmitted with it a proposed order. We are suggesting to Mr. daPonte that action on this stipulation be set down for hearing at the same time as the hearing on findings and decree.

The form of findings of fact and proposed decree has not been agreed to, and I am not

sure that counsel on both sides will reach an agreement as to their form. If proposed findings of fact, conclusions of law and decree are agreed to, I shall send you copies promptly. You will doubtless have notice of the time of hearing at which they will be presented to the court in time to be present and take such action as you may be advised is proper under the circumstances.

Respectfully,
(s) E. E. DANLY,
Enc. Special Assistant to Attorney General."

The action of the Northern Pacific Railway Company through its attorneys acting for the Northern Pacific Railroad Company in agreeing to the stipulation and having the decree entered, is another instance where the said railway company is acting to the prejudice, injury and harm of the railroad company while completely holding the railroad company in captivity.

The prayer "4a" in the amendment to the amended bill is in violation of the statute and the fact assumed that the railway company is the owner of the property and the only one with whom the Government is to deal or take into consideration is in direct violation of the Act of June 25, 1929.

Because these Movants were prevented from filing these objections to the granting of leave to amend the amended bill as stated in the stipulation before the decree was entered and because the Government

should not be permitted to amend the bill without complying with the mandate of the statute, the foregoing motion should be granted.

ROBERT L. EDMISTON,
Spokane, Wash.,
THOMAS BOYLAN,
RAYMOND M. HUDSON,
MINOR HUDSON,
GEOFFREY CREYKE, JR.,
Attorneys for Movants.

ATTORNEY'S CERTIFICATE

I, Robert L. Edmiston, hereby certify that I am one of the attorneys of record for Charles E. Schmidt, et al, intervening Minority Stockholders of the defendant Northern Pacific Railroad Company in the above entitled action; that I have read the foregoing Motion with the letters made a part thereof; that to the best of my knowledge, information and belief, there is good ground to support it; that it is not intended for delay; that the letters set out therein are true copies of the originals thereof, abiding with respective addressee.

Dated at Spokane, Washington, this 29th day of August, 1938.

ROBERT L. EDMISTON
Attorney for Intervening Petitioners,
Spokane, Washington.

RETURN OF SERVICE

State of Washington,
County of Spokane—ss.

Robert L. Edmiston being duly sworn on oath says: that affiant, is one of the attorneys of record for Charles E. Schmidt, et al., minority stockholders of the Northern Pacific Railroad Company, intervening petitioners in the above entitled action;

That affiant served the Motion to which this return is attached, comprising seven pages and Attorney's Certificate including pages designated as page 2-a and page 2-b, on the above named plaintiff, United States of America, by delivering to and leaving with Sam M. Driver, Attorney of record for said plaintiff, full, true copy thereof, in the city and county of Spokane, State of Washington, on this 29th day of August, A. D. 1938;

That affiant served said Motion upon the above named defendants by delivering to and leaving with Francis J. McKevitt, an Attorney of record for said defendants, in said cause, two true full copies thereof, in the city and county of Spokane, State of Washington, on the 29th day of August, A. D. 1938.

ROBERT L. EDMISTON

Subscribed and sworn to before me this 29th day of August, 1938.

[Seal] JOSEPH F. MORTON
Notary Public in and for the State of Washington, residing at Spokane, Wash.

CERTIFIED COPY

United States of America,
Eastern District of Washington—ss.

I, A. A. LaFramboise, Clerk of the United States District Court in and for the Eastern District of Washington, do hereby certify that the annexed and foregoing is a true and full copy of the original Motion to Strike Out Stipulation, Amendment to Amended bill and Prayer, and to Vacate and Modify the Decree of August 1, 1938, filed August 29, 1938, in cause entitled U. S. A. vs. N. P. Ry. Co., et al, No. E-4389, now remaining among the records of the said Court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Spokane this 29th day of August, A. D. 1938.

[Seal] A. A. LaFRAMBOISE,
Clerk

By.....
Deputy Clerk

[Endorsed]: Filed in the U. S. District Court Aug. 29, 1938.

[Endorsed]: Filed U. S. C. C. A. Aug. 31, 1938.

United States Circuit Court of Appeals
for the Ninth Circuit

8893

UNITED STATES OF AMERICA,
Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, et al.,
Defendants,

CHARLES E. SCHMIDT, et al.,
Intervening Petitioners.

ORDER

The petition of Charles E. Schmidt, et al, for leave to appeal from that portion of the order of March 9, 1938, denying leave to intervene, is granted; in so far as it requests leave to appeal from other portions of the order of March 9, 1938, and from other orders is denied; cost bond fixed at $500; no supersedeas allowed.

Dated July 5, 1938.

CURTIS D. WILBUR
Senior United States Circuit Judge

[Endorsed]: Filed Jul. 8, 1938. Paul P. O'Brien, Clerk.

In the District Court of the United States for the Eastern District of Washington, Northern Division

In Equity No. E-4389

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a corporation,
NORTHERN PACIFIC RAILROAD COMPANY, a corporation,
NORTHERN PACIFIC RAILROAD COMPANY, as reorganized in 1875,
NORTHWESTERN IMPROVEMENT COMPANY, a corporation,
BANKERS TRUST COMPANY, a corporation,
GUARANTY TRUST COMPANY, a corporation,
CITY BANK FARMERS TRUST COMPANY, a corporation,

Defendants,

CHARLES E. SCHMIDT, et al.,

Intervening Petitioners.

COST BOND ON APPEAL FOR INTERVENING APPELLANTS

Know All Men by These Presents:

That the Fidelity and Deposit Company of Maryland, a corporation, organized under the laws of the

State of Maryland, and authorized to transact in the State of Washington the business of entering into undertakings such as that evidenced by this contract, is held and firmly bound unto the United States of America, Plaintiff named above, and Northern Pacific Railway Company, a corporation, and other defendants above named, in the just and full sum of Five Hundred ($500.00) Dollars, for which sum, well and truly to be paid, it binds itself, its successors and assigns, firmly by these presents.

Sealed with its seal and dated this 24 day of May, 1938.

The condition of this obligation is such that whereas, on or about May 24th, 1932, October 3, 1935, January 29, 1936, March 9, 1938, and March 22 1938, appealable decrees were made and entered in the above entitled court and cause; and

Whereas, the Intervening Petitioners, Charles E. Schmidt, George Landell, executor of E. A. Landell, deceased, Clarence Loebenthal, trustee of Bernard Loebenthal, and Walter L. Haehnlen, on behalf of themselves and all other minority stockholders of the Northern Pacific Railroad Company, have petitioned for and been allowed by the above court, an appeal to the United States Circuit Court of Appeals for Ninth Circuit, at San Francisco, California, from said decrees, and a citation has been issued directed to the said plaintiff and other defendants, citing them to appear in the said United States Circuit Court of Appeals for Ninth Circuit thirty (30) days from and after the date of such citation,—

Now, therefore, the condition of this obligation is such that if the said appellants shall prosecute said appeal to effect, and answer all costs, if they fail to make good their plea, then the above obligation to be void, otherwise to remain in full force and virtue.

[Seal] FIDELITY AND DEPOSIT COMPANY OF MARYLAND
By LAWRENCE BRUNETTS
Attorney-in-fact

Attest:
M. S. McCREA
Agent

The foregoing undertaking approved by the Court this ..... day of May, 1938.

CURTIS D. WLIBUR
Senior Circuit Judge of the United States Circuit Court of Appeals for 9th Circuit

Due and timely service of the foregoing Bond by receipt of a true copy thereof acknowledged this ..... day of May, 1938.

.....
Attorneys for Plaintiff, Appellee

.....
Attorneys for Defendant, Appellees

[Endorsed]: Filed U. S. C. C. A. July 19, 1938.

CITATION ON APPEAL

United States of America—ss.

The President of the United States of America

To United States of America, Plaintiff, and Northern Pacific Railway Company, a Corporation, Northern Pacific Railroad Company, a Corporation, Northern Pacific Railroad Company, as Reorganized in 1875, Northwestern Improvement Company, a Corporation, Bankers Trust Company, a Corporation, Guaranty Trust Company, a Corporation, City Bank Farmers Trust Company, a Corporation, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States Circuit Court of Appeals for the Ninth Circuit, wherein Charles E. Schmidt, George Landell, Executor of E. A. Landell, Deceased, Clarence Loebenthal, Trustee of Bernard Loebenthal, and Walter L. Haehnlen, Intervening Petitioners on behalf of themselves and other minority stockholders of the Northern Pacific Railroad Company, are appellants, and you are appellees, to show cause, if any there be, why that portion of the order rendered on March 9, 1938, against the said appellant, denying leave to intervene, as in the said order allowing appeal mentioned, should

not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Curtis D. Wilbur, Senior United States Circuit Judge for the Ninth Judicial Circuit this 18th day of July, A. D. 1938.

CURTIS D. WILBUR
Senior United States Circuit Judge

[Endorsed]: U. S. C. C. A. July 23, 1938.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 8893

UNITED STATES OF AMERICA,
Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, et al.,
Defendants,

CHARLES E. SCHMIDT, et al.,
Intervening Petitioners.

RETURN OF SERVICE OF CITATION

State of Washington,
County of Spokane—ss.

Robert L. Edmiston being duly sworn on oath says: that affiant is one of the attorneys of record for the Intervening Petitioners in the above en-

titled action, a citizen of the United States, residing in the City of Spokane, State of Washington, over the age of twenty-one (21) years, and competent to be a witness in the above entitled action; that affiant served the Citation issued in the above entitled action July 18th, 1938, by Curtis D. Wilbur, Senior United States Circuit Judge, and therewith served the Order made by said Judge in said proceeding dated July 5th, 1938, and also therewith served a true copy of the Order of March 9th, 1938, made by the Judge of the District Court of the United States, for the Eastern District of Washington, Northern Division, upon the above named plaintiff, United States of America, by delivering to and leaving with Sam M. Driver, one of the attorneys of record for plaintiff, in the above entitled action, in the City and County of Spokane, State of Washington, two true copies thereof, each duly certified by affiant to be true copies thereof.

That affiant served said Citation together with a copy of said Order of Judge Wilbur of July 5th, 1938, and also a true copy of the Order of March 9th, 1938, issued in the said District Court, by delivering to and leaving with Francis J. McKevitt, one of the attorneys of record for the above named defendants, three true copies of said Citation, and Orders, same being certified by Robert L. Edmiston to be true copies of the originals thereof in the City and County of Spokane, State of Washington, on the 21st day of July, A. D. 1938.

ROBERT L. EDMISTON

Subscribed and sworn to before me this 21st day of July, A. D. 1938.

[Seal] ALBERT H. SUNDAHL,
Notary Public in and for the State of Washington, residing at Spokane, Wash.

[Endorsed]: Filed U. S. C. C. A. July 23, 1938.

[Title of Circuit Court of Appeals and Cause.]

ORDER.

The petition of Charles E. Schmidt, et al. for leave to appeal from that portion of the order of March 9, 1938, denying leave to intervene, is granted; in so far as it requests leave to appeal from other portions of the order of March 9, 1938, and from other orders is denied; cost bond fixed at $500.; no supersedeas allowed.

Dated July 5, 1938.

CURTIS D. WILBUR,
Senior United States Circuit Judge.

[Endorsed]: Order allowing appeal, etc. Filed July 8, 1938. Paul P. O'Brien, Clerk.

In the District Court of the United States for the Eastern District of Washington, Northern Division.

[Title of Cause.]

ORDER DENYING LEAVE TO INTERVENE AND STRIKING ANSWER AND CROSS-BILL.

On this day the motions of plaintiff and defendants Northern Pacific Railway Company, Northern Pacific Railroad Company, and Northwestern Improvement Company, to strike from the files the document entitled, "Answer and Cross Bill of the Northern Pacific Railroad Company by Charles E. Schmidt and other minority stockholders of said Railroad Company", and the motion of said parties for leave to file and serve said document, having been heard, it is ordered that the motion of the plaintiff and of said defendants to strike said above described document from the files, be, and the same is hereby, granted, and the said motion for leave to file and serve said document be and the same is hereby denied.

The motion of Walter L. Haehnlen and others for leave to file intervening petition attached to said motion, having come on to be heard, it is ordered that the said motion be, and the same is, hereby denied, and said petition of Charles E. Schmidt and other stockholders of the Northern Pacific Railroad Company to intervene on their own behalf and on behalf of all other stockholders similarly situated,

be, and the same is hereby stricken from this cause.

"Motion of the Northern Pacific Railroad Company by Charles E. Schmidt and others, minority stockholders, and of said Charles E. Schmidt and others, minority stockholders, petitioners, to construe, modify and/or amend the report of the Special Master Graves filed July 26, 1937", coming on to be heard, it is ordered that said motion be, and the same is hereby denied.

That certain document entitled, "Joinder of the Northern Pacific Railroad Company by Charles E. Schmidt and Others, minority stockholders, and of said Charles E. Schmidt and others, minority stockholders, petitioners, in the two motions filed to re-refer the report to the Special Master", and that certain document entitled, "Exceptions of Northern Pacific Railroad Company by Charles E. Schmidt and others, minority stockholders, and of said Charles E. Schmidt and others, minority stockholders, petitioners, to the report of Special Master Graves filed July 26, 1937", having come on to be heard, it is ordered that the same be, and they are hereby stricken from the files in this cause.

"Motion on behalf of the said Northern Pacific Railroad Company for an extension of time to file exceptions to the Special Master's Report filed July 26th, 1937", having come on to be heard, it is ordered that the same be, and it is hereby stricken from the files in this cause.

It is further ordered, that this order shall be without prejudice to the right of said Charles E. Schmidt, George Landell, executor of E. A. Landell,

deceased, Clarence Lobenthal, trustee of Bernard Lobenthal, and Walter L. Haehnlen, themselves or as representatives of other stockholders of said Northern Pacific Railroad Company, or of such other stockholders themselves, to assert in any other proceeding any rights which they may have by reason of the matters and things alleged in said answer and cross-bill and in said intervening petition.

Exception is allowed the Petitioners in intervention to all of the rulings above.

Dated at Spokane, Wash.
March 9, 1938.

J. STANLEY WEBSTER,
District Judge.

[Endorsed]: Filed March 9, 1938.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 8893.

CHARLES E. SCHMIDT, ET AL., MINORITY STOCKHOLDERS OF N. P. R. R. CO., INTERVENING PETITIONERS,
Appellants,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, ET AL.
Appellees.

DESIGNATION OF THE RECORD.

Now come the appellants and designate the following documents in the record on appeal which the clerk will print:

1. Bill of Complaint filed July 31, 1930 and Exhibits "M" and "N" to said Complaint.

2. Voluntary Appearance of Defendants filed September 10, 1930.

3. Appearance of Attorneys for Northern Pacific Railway Company filed December 5, 1930.

4. Stipulation of Amendments to Bill of Complaint filed June 25, 1931.

5. Order approving stipulation covering amendments filed June 25, 1931.

6. Amended and Supplemental Answer of Defendant Northern Pacific Railway Company filed July 18, 1931.

7. Request for hearing on points of law by Northern Pacific Railway Company and N. W. Improvement Company filed July 18, 1931.

8. Disclaimer of Northern Pacific Railroad Company filed January 18, 1932.

9. Plaintiff's motion to strike Disclaimer of Northern Pacific Railroad Company filed February 13, 1932.

10. Answer of Northern Pacific Railroad Company filed May 9, 1932.

11. Request for hearing on points of law by Northern Pacific Railroad Company filed May 9, 1932.

12. Order of reference to Special Master of May 24, 1932.

13. Special Master's first Report filed May 31, 1933.

14. Exceptions of Northern Pacific Railway Company, Northern Pacific Railroad Company and Northwestern Improvement Company filed June 20, 1933 to First Report of Special Master.

15. Plaintiff's Exceptions filed July 8, 1933 to First Report of Special Master.

16. Order of compensation to Special Master dated January 25, 1934.

17. Memorandum Opinion of Court on Exceptions to Special Master's First Report filed September 9, 1935.

18. Order pursuant to opinion on Exceptions to Special Master's First Report dated October 3, 1935.

19. Order of January 29, 1936 amending order dated October 3, 1935.

20. Order of April 21, 1936 for further reference to Special Master Graves.

21. Appearance of L. B. daPonte for Defendants Northern Pacific Railway Company, Northern Pacific Railroad Company and Northwestern Improvement Company filed July 22, 1937.

22. Special Master's Second Report filed July 26, 1937.

23. Exceptions of Defendants Northern Pacific Railway Company, Northern Pacific Railroad Company and Northwestern Improvement Company filed August 9, 1937 to the Master's Second Report.

24. Supplemental Exceptions of Defendants Northern Pacific Railway Company, Northern Pacific Railroad Company and Northwestern Improvement Company filed August 11, 1937 to Master's Second Report.

25. Plaintiff's Exceptions filed August 13, 1937 to Master's Second Report.

26. Motion of Minority Stockholders of Northern Pacific Railroad Company filed August 25, 1937 for extension of time to file Exceptions to Master's Second Report.

27. Answer and Cross Bill of Northern Pacific Railroad Company by Minority Stockholders filed September 3, 1937.

28. Plaintiff's Motion filed September 13, 1937 to Strike Answer and Cross Bill of Northern Pacific Railroad Company by Minority Stockholders.

29. Motion of Northern Pacific Railway Company, Northern Pacific Railroad Company and Northwestern Improvement Company filed September 15, 1937 to strike Answer and Cross Bill of Northern Pacific Railroad Company by Minority Stockholders.

30. Motion of Minority Stockholders of Northern Pacific Railroad Company for leave to file Petition in intervention filed January 31, 1938.

31. Intervening Petition filed with said Motion January 31, 1938.

32. Appearance of counsel for Northern Pacific Railroad Company by Minority Stockholders filed February 14, 1938.

33. Appearance of counsel for Minority Stockholders as intervening Petitioners filed February 14, 1938.

34. Motion of Northern Pacific Railroad Company by Minority Stockholders to construe, modify

and amend filed February 19, 1938, the Second Report of Special Master.

35. Exceptions filed February 19, 1938 of Northern Pacific Railroad Company by Minority Stockholders, and of Minority Stockholders—Intervening Petitioners—to Second report of Special Master.

36. Order of March 9, 1938 denying leave to intervene and striking Answer and Cross Bill of Northern Pacific Railroad Company by Minority Stockholders.

37. Petition of Northern Pacific Railroad Company by Minority Stockholders filed March 11, 1938 to review and amend order of March 9, 1938.

38. Petition of Minority Stockholders—Intervening Petitioners—filed March 11, 1938 to review and amend order of March 9, 1938.

39. Motion of Northern Pacific Railroad Company by Minority Stockholders filed March 17, 1938 to dismiss original and amended Bill of Complaint.

40. Order of March 22, 1938 denying petitions to review and amend order of March 9, 1938.

41. Order of March 22, 1938 on Exceptions to Master's Second Report—sustaining some, denying others.

42. Assignment of Errors of Northern Pacific Railroad Company by Minority Stockholders filed March 22, 1938 being No. 42 in clerk's certificate.

43. Amendment to Assignment of Errors of Northern Pacific Railroad Company by Minority Stockholders filed March 25, 1938, being No. 43 clerk's certificate.

44. Assignment of Errors of Minority Stockholders—Intervening Petitioners filed March 22, 1938, being No. 49 Clerk's Certificate.

THOMAS BOYLAN,
RAYMOND M. HUDSON,
MINOR HUDSON,
GEOFFREY CREYKE, JR.,
ROBERT L. EDMISTON,
Attorneys for Appellants.

[Title of Circuit Court of Appeals and Cause.]

RETURN OF SERVICE OF DESIGNATION OF RECORD.

State of Washington,
County of Spokane—ss.

Robert L. Edmiston being duly sworn on oath says: that affiant is one of the attorneys of record for the above named appellants, a citizen of the United States, residing in the City of Spokane, State of Washington, over the age of twenty-one (21) years, and competent to be a witness in the above entitled action;

That affiant served the Designation of the record upon Appellee-plaintiff, United States of America, on the 30th day of July, A. D. 1938, by delivering to and leaving with Sam M. Driver, two full true copies thereof, in the city and county of Spokane, State of Washington;

That affiant served the Designation of the Record of Appellants in the above entitled proceeding on the 30th day of July, A. D. 1936, by delivering to and leaving with Francis J. McKevitt, Attorney of Record for appellees, other than plaintiff United States of America, two full true copies thereof, in the City and County of Spokane, State of Washington; original of which Designation of Record as served is hereto attached and made a part hereof.

ROBERT L. EDMISTON.

Subscribed and sworn to before me this 30th day of July, 1938.

[Seal] JOSEPH F. MORTON.

Notary Public in and for the State of Washington. Residing at Spokane, Wash.

[Endorsed]: Filed U. S. C. C. A. Aug. 5, 1938.

[Endorsed]: No. 8893. United States Circuit Court of Appeals for the Ninth Circuit. Charles E. Schmidt, George Landell, executor of E. A. Landell, deceased, Clarence Loebenthal, Trustee of Bernard Loebenthal, and Walter L. Haehnlen, intervening petitioners on behalf of themselves and other minority stockholders of the Northern Pacific Railroad Company, vs. United States of America and Northern Pacific Railway Company, a corporation, Northern Pacific Railroad Company, a corporation, Northern Pacific Railroad Company, as reorganized in 1875, Northwestern Improvement Company, a corporation, Bankers Trust Company, a corporation, Guaranty Trust Company, a corporation, City Bank Farmers Trust Company, a corporation, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Eastern District of Washington, Northern Division.

Filed August 5, 1938.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

No. ———

NORTHERN PACIFIC RAILROAD COMPANY, BY CHARLES E. SCHMIDT, ET AL., Minority Stockholders,

Petitioners,

vs.

THE UNITED STATES OF AMERICA, NORTHERN PACIFIC RAILWAY COMPANY, ET AL.

CHARLES E. SCHMIDT, ET AL., Minority Stockholders of the Northern Pacific Railroad Company,

Petitioners,

vs.

THE UNITED STATES OF AMERICA, NORTHERN PACIFIC RAILWAY COMPANY, ET AL.

BRIEF OF NORTHERN PACIFIC RAILWAY COMPANY, NORTHERN PACIFIC RAILROAD COMPANY, AND NORTHWESTERN IMPROVEMENT COMPANY IN OPPOSITION TO PETITIONS FOR APPEAL.

L. B. Da PONTE,
F. J. McKEVITT,
D. R. FROST,
Attorneys for Northern Pacific Railway Company and other Defendants.

Review Publishing Co., 141 E. Fifth St., St. Paul, Minn.

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AUTHORITIES CITED.

STATUTES CITED.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

No. ———

NORTHERN PACIFIC RAILROAD COMPANY, BY CHARLES E. SCHMIDT, ET AL., Minority Stockholders,

Petitioners,

vs.

THE UNITED STATES OF AMERICA, NORTHERN PACIFIC RAILWAY COMPANY, ET AL.

CHARLES E. SCHMIDT, ET AL., Minority Stockholders of the Northern Pacific Railroad Company,

Petitioners,

vs.

THE UNITED STATES OF AMERICA, NORTHERN PACIFIC RAILWAY COMPANY, ET AL.

BRIEF OF NORTHERN PACIFIC RAILWAY COMPANY, NORTHERN PACIFIC RAILROAD COMPANY, AND NORTHWESTERN IMPROVEMENT COMPANY IN OPPOSITION TO PETITIONS FOR APPEAL.

Certain stockholders of Northern Pacific Railroad Company submit petitions for allowance of appeals to this court

from orders referred to in their papers that were entered in the suit pending in the United States District Court for the Eastern District of Washington, Northern Division, entitled "United States of America versus Northern Pacific Railway Company, et al, Defendants, in Equity No. E-4389. The suit had been in progress more than seven years when these stockholders, on August 25, 1937, took the first step for being heard in the case. In order to assist this court in consideration of the reasons that we urge why these petitions ought to be denied, we will make a short statement about the nature of the suit and the proceedings therein taken.

June 25, 1929, Act of Congress approved (C. 41, 46 Stat. L. 41) directing the Attorney General to institute suit for determination of controversies and the rights of the parties arising out of land grants made to Northern Pacific Railroad Company by Acts of Congress of July 2, 1864 and May 31, 1870. The Act specified a number of issues that were to be raised, and it provided "any case begun in accordance with this Act shall be expedited in every way and be assigned for hearing at the earliest practicable day in any court in which it may be pending."

July 31, 1930, bill of complaint filed.

June 25, 1931, certain amendments to bill of complaint made.

July 18, 1931, amended and supplemental answer of defendant, Northern Pacific Railway Company, filed.

January 18, 1932. motion filed to quash return of service upon the "Northern Pacific Railroad Company, as reorganized in 1875."

Motion of plaintiff filed to strike from record disclaimer of Northern Pacific Railroad Company.

February 25, 1932, order entered appointing Special Master and referring to him for consideration and report thereon pending motions, defenses in point of law arising upon the face of the complaint and certain other defenses made in the amended answers.

April, 1932, testimony taken by Master at Washington, D. C., New York City and Missoula, Montana, and in May at Spokane.

May, 1932, oral argument before the Master by counsel for the Railway Company upon the defenses above mentioned. In the course of the hearing attention was given to the motion to strike the disclaimer of Northern Pacific Railroad Company. The Master indicated his ruling would be that it should be stricken. Thereupon, May 9, 1932, answer of Northern Pacific Railroad Company was filed, adopting the amended and supplemental answer of the Railway Company. The court entered an order referring to the Special Master the defenses raised by the Railroad Company. From and after the date of filing its answer, Northern Pacific Railroad Company has joined in all proceedings in the suit, having the same counsel as those appearing for the Railway Company and the Improvement Company. Counsel for plaintiff, after the oral argument above named, filed an elaborate written argument and brief.

May 31, 1933, report of the Special Master filed. The parties filed exceptions to the report and in January, 1934, the court heard arguments on exceptions, followed by submission of briefs.

October 3, 1935, order entered overruling all exceptions and adopting the Master's report. This order was amended by an order of January 29, 1936, that postponed consideration of an issue raised by the two trust companies.

April 21, 1936, amended order of reference entered. The Master was directed to hear the evidence and report on all issues except the issue of the value of lands for which any party might be entitled to compensation. Thereafter the Master held several hearings for taking testimony. Several hundred pages of testimony were taken, and more than 450 exhibits were introduced in evidence.

May 22, 1936, Act approved (C. 444, 49 Stat. 1369) authorizing direct review on appeal by any party by Supreme Court of the United States of the order or decree entered on review of the report of the Master pursuant to the order of April 21, 1936, and of the order or decree entered October 3, 1935, as amended by the order of January 29, 1936.

July 26, 1937, report of the Special Master pursuant to the order of reference of April 21, 1936. Within due time the exceptions of the parties to the report were filed.

August 25, 1937, these stockholders filed a motion for an order extending for thirty days the time "within which said Railroad Company may file exceptions to the report of Commissioner Frank H. Graves."

September 3, 1937, these stockholders, without asking leave of court, filed a paper entitled "Answer and Cross-Bill of the Northern Pacific Railroad Company by Charles E. Schmidt and Other Minority Stockholders of Said Railroad Company". Motions were filed by plaintiff and by the Railway Company and other defendants to strike said pleading from the files.

December 18, 1937, Mr. Edmiston, of counsel for said stockholders, stated in open court that he and his associates wished to argue motion for leave to interpose the answer and cross-bill at the time set for arguments on the exceptions.

January 31, 1938, these stockholders filed a motion for leave to file a petition entitled "Petition of Charles E. Schmidt and Other Stockholders of the Northern Pacific Railroad Company to Intervene On Their Own Behalf and On Behalf of All Other Stockholders Similarly Situated."

March 7, 1938, the day set for commencement of argument on exceptions, the court listened to counsel for these stockholders on their motions through the forenoon session, and announced its ruling. Order denying the motions was filed March 9. Arguments on the exceptions were had until March 17. On the afternoon of that day the court again heard counsel for the stockholders on motions they had filed, one of said motions being to dismiss the Government's complaint and amended complaint. Said counsel completed their arguments and the court stated that the motions were denied.

March 22, the order was filed denying the motions of the stockholders, and also order was filed that contains rulings on certain of the exceptions.

March 23, 1938, these stockholders presented two petitions for allowance of appeals to the Supreme Court of the United States. The court allowed the petitions and signed citations. On March 30, 1938 the court, on its own motion, entered an order vacating the allowance of the petitions for appeal and the citations, and setting a date for argument on the allowance of said petitions.

April 30, 1938, order entered after arguments denying petitions of stockholders for appeal to Supreme Court.

May 16, 1938, Supreme Court denied petitions of said stockholders for appeal.

I. The orders denying leave to intervene are not appealable. They are discretionary orders. No right of any stockholder of the Railroad Company is finally determined by the orders.

The order entered March 9, 1938, denied the motion for leave to file and serve the answer and cross-bill and struck said document from the files, and denied the motion for leave to file the intervening petition of Charles E. Schmidt and others and struck said document from the files. The order entered March 22, 1938 denied the motion to dismiss the complaint and amended complaint of plaintiff, denied the motion to revise and amend the order of March 9, 1938, and denied the motion to amend the cross-bill and answer by making a part of it the intervening petition. The two orders show on their face that they do not finally dispose of any right of these four stockholders or any stockholders of the Railroad Company. The order of March 9, 1938, contains this provision:

> *"It Is Further Ordered,* that this order shall be without prejudice to the right of said Charles E. Schmidt, George Landell, executor of E. A. Landell, deceased, Clarence Lobenthal, trustee of Bernard Lobenthal, and Walter L. Haehnlen, themselves or as representatives of other stockholders of said Northern Pacific Railroad Company, or of such other stockholders themselves, to assert in any other proceeding any rights which they may have by reason of the matters and things alleged in said answer and cross-bill and in said intervening petition."

The order of March 22 provides:

> *"It Is Further Ordered,* that this order shall be without prejudice to the right of said Charles E. Schmidt, George Landell, executor of E. A. Landell, deceased,

Clarence Lobenthal, trustee of Bernard Lobenthal, and Walter L. Haehnlen, themselves or as representatives of other stockholders of said Northern Pacific Railroad Company, or of such other stockholders themselves to assert later in this cause, when the fund, if any, to be distributed by the United States, is established and fixed or in any other proceeding, any rights which they may have by reason of the matters and things alleged in said answer and cross-bill and in said intervening petition."

The general rule is that an order denying leave to intervene in a pending suit is a discretionary one and that it is not appealable. These stockholders cannot point to any circumstance that brings them under an exception to that general rule. They do not, in any pleading filed, charge the Railway Company or Railroad Company with any bad faith in the conduct of the litigation. In the answer and cross-bill and intervening petition there are allegations about the Railroad Company being held in captivity and that the Railway Company is seeking, in this litigation, to obtain additional land and compensation for lands that rightfully belong to the Railroad Company, the federal corporation. But there is no claim that the Railway Company and Railroad Company have not in good faith defended this suit, and no claim is made that the Railway Company is not putting forth or has not put forth every possible effort to procure every acre, or pay for every acre, that the grantee was entitled to under the Act of July 2, 1864, and Joint Resolution. No fund is being administered by the court. As pointed out in a decision of this court, hereafter quoted, it cannot be known whether there ever will be a fund for distribution in this suit until after the decision of the United States Supreme Court on the appeals expected to be taken

after the decree is entered upon the review of the Master's last report.

In assignment of error No. XVIII filed by these stockholders in the Supreme Court with the petitions for appeal (and this same assignment No. XVIII was included in those filed in the District Court), reference was made to a suit pending in the Circuit Court of the United States for the Southern District of New York. The assignment in part was:

> "That the minority stockholders on behalf of themselves and petitioners, and aided by them on November 21, 1900, instituted a suit in the Circuit Court of the United States in the Southern District of New York, seeking relief sought in the answer and cross-bill, which suit is still pending and undetermined, and was recently revived by the court in the name of the executor of the plaintiff."

That suit was brought by one Joseph Hoover against the Northern Pacific Railway Company and a number of individuals. Mr. Hudson, of counsel for these stockholders, is representing plaintiff in the Hoover suit. In the argument before Judge Webster last March, counsel for these stockholders asserted that said stockholders were participating in the Hoover suit. In the same assignment of error above referred to, it is alleged:

> "and further these petitioners had since 1900 continuously sought a Congressional Investigation so as to obtain the facts set out in the answer and cross-bill and intervening petition, which were hidden and secreted by the Northern Pacific Railway Company, and other facts, which are still hidden and secreted by the Railway Company and petitioners believe they can state, without fear of successful challenge, that but for the continuous

acts and efforts of the petitioners, the Joint Congressional Committee investigation of 1925, resulting in the Act of June 25, 1929, would never have been obtained, or the Act passed, or this suit authorized but for such efforts of the petitioners and information they furnished the Government."

(Assignment of Error No. XXI filed with petitions for appeal in this Court is similar to above assignment No. XVIII.)

It follows that since 1900 there has been nothing to prevent these stockholders from asserting their rights either in the Hoover suit or in some other suit brought for the purpose.

In *Credits Commutation Co. v. United States,* 177 U. S. 311, the court says:

"The view of the Circuit Court of Appeals was that the order of the Circuit Court refusing leave to intervene was not a final judgment or decree from which an appeal could be taken, and that, at any rate, the action of the lower court in refusing leave to intervene was not reviewable on appeal, inasmuch as it rested in the sound discretion of the chancellor to admit or reject the intervention." (p. 314)

"The question was well considered by the Circuit Court of Appeals, and we quote and adopt its statement, as follows:

" 'When such an action is taken, that is to say, when leave to intervene in an equity case is asked and refused, the rule, so far as we are aware, is well settled that the order thus made denying leave to intervene is not regarded as a final determination of the merits of the claim on which the intervention is based, but leaves the petitioner at full liberty to assert his rights in any other appropriate form of proceeding. Such an order

not only lacks the finality which is necessary to support an appeal, but it is usually said of it that it cannot be reviewed, because it merely involves an exercise of the discretionary powers of the trial court. * * * It is doubtless true that cases may arise where the denial of a third party to intervene therein would be a practical denial of certain relief to which the intervenor is fairly entitled, and which he can only obtain by an intervention. Cases of this sort are those where there is a fund in court undergoing administration to which a third party asserts some right which will be lost in the event that he is not allowed to intervene before the fund is dissipated.'" (pp. 315-16)

(The above decision is cited and followed in *New York City v. New York Telephone Company,* 261 U. S. 312 and *New York City v. Consolidated Gas Company,* 253 U. S. 219.)

In *O'Connell v. Pacific Gas & Electric Co.,* (9th C. C. A.) 19 Fed. (2d) 460, this court says:

"The appellant, in view of the fact that his individual claim against the gas and electric company in any separate proceeding is barred by the statute of limitations, contends that the intervention here sought is his only remedy to recover the money taken from him by the gas and electric company, and that he has an absolute right to intervene." (p. 460)

"It is to be remembered that there is here no impounded fund in the possession of a court, to be disbursed at the end of pending litigation.

* * * * *

"Here neither fraud, bad faith, bad judgment, nor conspiracy is shown on the part of the municipal authorities, who represent all of the gas consumers. The application for leave to intervene rests upon no statute or other authority than the federal equity rules. The appellant is represented in the litigation by the city

and county of San Francisco, as are all other consumers of gas whose rights are involved." (p. 461)

In *Barceloux v. Buffum* (9th C. C. A.) 51 Fed. (2d) 82, on pages 84-85, this court says:

"If the appellant by reason of the contract of herself and her husband with the defendant corporation retains a life interest or any interest whatever, in the property of the corporation, any sale of property of the corporation would, of course, be subject to this claim, and the purchaser would take it with that burden. She could not be injured by a sale of property of the corporation, subject to her right to the income derived therefrom. On the other hand, if her claim to the income of the property, or to an amount equal thereto, merely constitutes her a general creditor of the corporation, her right to intervene depends upon the right of a general creditor of a corporation to intervene in an action brought by another general creditor to obtain a money judgment, at law or in equity, where it is believed and claimed that the liquidation of the indebtedness due the creditor bringing the suit will render the defendant debtor a bankrupt. No case going this far has been cited or discovered. Where a debtor is acting in good faith in making his defense to a creditor's action against him, there is no occasion for, or right of, intervention by another general creditor.

* * * * *

"We are not concerned on this appeal from the dismissal of the petition for intervention with the question of whether or not the trial court committed error in fixing the value of the property alleged to have been converted, or in entering judgment therefor, or in subordinating the claims of the defendant corporation to others, but solely with the right of the appellant to intervene in this action to protect her own rights, as distinguished from the rights of the respondent corporation, which

> are being actually litigated in good faith by the respondent corporation, and can be considered upon an appeal from the judgment. The order of the trial court, being an exercise of a sound discretion committed to it by the law, is not appealable."

This court in the late decision *State of Washington v. United States,* 87 Fed. (2d) 421, 433-435 gave thorough consideration to right of appeal from an order denying intervention and cited many cases. Applying the tests there announced it appears plainly that the petitions for appeal should be denied.

In *Palmer v. Bankers' Trust Co.* (8th C. C. A.) 12 Fed. (2d) 747, on page 752, the court says:

> "In each case the court is called upon to exercise its sound legal judgment. In some cases the facts and circumstances may be such that to deny the intervention would be error on the part of the chancellor; for example, where the petitioner, not being already fairly represented in the litigation, is asserting a right which would be lost or substantially affected if it could not be asserted at that time and in that form. In such cases the right of intervention is often termed absolute. (Citing cases.) In other cases, the facts and circumstances may be such that the court is clearly justified in denying intervention. The mere matter of delay alone is often a decisive factor with the court. First Nat. Bank v. Shedd, 121 U. S. 74, 86, 7 S. Ct. 807, 30 L. Ed. 877; Central Trust Co. v. C., H. & D. R. Co. (C. C.) 169 F. 466, 472."

In *Lewis v. Baltimore & L. R. Co.* (4th C. C. A.) 62 Fed. 218, on pages 221-222 the court says:

> "No right of the petitioner has been finally adjudicated by any of the orders of the court. Besides, this refusal

of the circuit court to admit Street as a party is not an appealable order. It is in no sense a final judgment. It concludes no right. In the language of Waite, C. J., in Ex Parte Cutting, 94 U. S. 22: 'No appeal lies from the order refusing them leave to intervene to become parties. That was a motion in the cause, and not an independent suit in equity, appealable here.' Were the courts of last resort to entertain appeals to make a person a party, causes would be constantly going up piecemeal, great confusion would be created, and insufferable delays caused. The petitioner, not being a party to the suit, cannot be heard on an appeal therefrom."

See also *Rodman v. Richfield Oil Co.* (9th C. C. A.) 66 Fed. (2d) 244, 251-252.

II. Leave to intervene was rightly denied because said stockholders were seeking to litigate issues already passed upon, other issues outside the purposes of the suit, and they sought dismissal of plaintiff's complaint and the amendments thereto.

Equity Rule 37 requires that "intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding". A considerable part of the answer and cross-bill and intervening petition is an attack upon the validity of the foreclosure proceedings that resulted in the sales held in 1896, at which the Railway Company acquired the property. The Master, in his report filed May 21, 1933, pages 200-203, ruled that the Railway Company is the lawful successor to the property and rights of the Railroad Company. Said ruling was adopted by the court in its order of October 3, 1935.

Two Attorneys General have ruled that the Railway Company is the lawful successor to the property and rights in

the land grants of the Railroad Company. Attorney General Harmon, February 6, 1897, Vol. 21 Op. Atty. Gen. 486; Attorney General Moody, April 12, 1905, Vol. 25 Op. Atty. Gen. 401. In *United States v. Northern Pacific Railway Company,* 256 U. S. 51, on page 58, the court said:

> "The rights and obligations of the original railroad company arising out of the grant have long since passed to the present railway company and there is no need here for distinguishing one company from the other."

These stockholders have no right to attempt intervention for the purpose of trying again an issue that was disposed of in this suit nearly two years before the filing of their answer and cross-bill.

In their pleadings the stockholders allege the invalidity of the corporate organization of Northern Pacific Railway Company, and that the United States Circuit Court for the Eastern District of Wisconsin had no jurisdiction in the foreclosure proceedings of 1893-1896. No such issues were raised by the Government in this suit. One of the motions denied by the order entered March 22, 1938 was the motion to dismiss the complaint and amended complaint. It is well settled that intervention is not permitted for such purposes.

In *Board of Drainage Com'rs. v. Lafayette Southside Bank of St. L.,* (4th C. C. A.) 27 Fed. (2d) 286, the court says:

> "This rule, in plain terms, permits intervention in subordination to, and in recognition of, the propriety of the main proceedings, hence to seek to intervene with the view of challenging the jurisdiction of the court, or otherwise inaugurating litigation not within the scope and purview of the original suit, is not permissible, and should be denied. Union Trust Co. v. Jones, 16 F. (2d)

236 (a decision of this court), and cases cited." (p. 296)

"The effort to intervene was in no sense one in recognition of the propriety of the main proceedings or intended to be subordinate thereto, but, on the contrary, was directly antagonistic to everything that was sought to be done in the main suit, and intended to contravene the same, and was filed therein after that suit had been pending more than two years." (p. 296)

(2) In *Whittaker v. Brictson Mfg. Co.,* (8th C. C. A.) 43 Fed. 485, the court says:

(p. 489) "While intervention under some circumstances may be a matter of right, if properly presented to the court, it is generally a matter of sound legal discretion exercised in line with recognized judicial standards in the interest of justice.

(p. 490) "In Mueller et al v. Adler, et al, 292 F. 138, 139, this court holds that under Equity Rule 37 an intervention for the purpose of attacking the jurisdiction of the court in the main suit is not permissible, and that a motion by an intervener to dismiss the main bill cannot be entertained.

(p. 490) "We quote from 11 Encyclopedia of Pleading and Practice, pp. 509, 510: 'An intervener in a suit between other parties must accept such suit as he finds it, and is bound by the record of the case at the time of his intervention. He cannot raise an issue as to whether the proceedings are regular, nor can he plead exceptions having for their object the dismissal of the action. He cannot raise new issues in the suit, nor insist upon a change in the form of the proceeding.'

(p. 491) "To seek to set aside the entire proceedings in a case and to have the same held for naught on the ground that they were absolutely void cannot be in recognition of the propriety of the main suit."

III. The delay and confusion that would result from permitting these stockholders now to inject their alleged grievance into this suit were sufficient grounds for denial of intervention.

Before the stockholders made the first gesture to come into the case, the time had expired in which to file exceptions to the report of the Master made pursuant to the order of April 21, 1936. Following the argument on exceptions last March, the court entered the order of March 22 that rules on most of the exceptions. However, the order provides:

> "It further appearing to the court that there are additional matters connected with such report of the Master, which are yet to be considered and determined by the court before the review of said report may be completed, and that for the purpose of completing the review of said report of the Master and in order to enter an order or decree of this Court upon such review as required by the Act of June 25, 1929, and from which order or decree an appeal is authorized by the Act of May 22, 1936, it is necessary that the court make such Findings of Fact and Conclusions of Law as the Court's review of said Master's report may require;
>
> *"It Is Ordered,* that the parties hereto submit to the Court their proposed Findings of Fact and Conclusions of Law, together with their suggested draft or drafts of such order or decree."

Since then the parties have been working on necessary exhibits that will contain descriptions of more than 2,800,000 acres of land, the proposed Findings of Fact and Conclusions of Law, and proposed form of decree to be entered. The expectation is that the Government and the Railway Company and other defendants will appeal from the decree

to the Supreme Court. The intention of Congress is plainly enough expressed in the Act of May 22, 1936. Should the orderly hearing of this case in the Supreme Court be delayed or confused by four stockholders of the Railroad Company who now are attempting an appeal from orders that so manifestly are not appealable?

It is respectfully submitted that the petitions for appeal ought to be denied.

L. B. Da PONTE,
F. J. McKEVITT,
D. R. FROST,
Attorneys for Northern Pacific Railway Company and other Defendants.

June ———, 1938.

NO. .....

In the United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Plaintiff.

v.

NORTHERN PACIFIC RAILWAY COMPANY,
a corporation,
NORTHERN PACIFIC RAILROAD COMPANY,
a corporation,
NORTHERN PACIFIC RAILROAD COMPANY,
as reorganized in 1875.
NORTHWESTERN IMPROVEMENT COMPANY,
a corporation,
BANKERS TRUST COMPANY,
a corporation,
GUARANTY TRUST COMPANY,
a corporation,
CITY BANK FARMERS TRUST COMPANY,
a corporation.
Defendants.

CHARLES E. SCHMIDT, et al.,
Intervening Petitioners.

ON PETITIONS FOR APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON.

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO PETITIONS FOR APPEAL.

WALTER L, POPE,
Missoula, Montana,
E. E. DANLY,
Washington, D. C.
Special Assistants to the Attorney General.

MISSOULIAN

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ON PETITIONS FOR APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON.

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO PETITIONS FOR APPEAL.

The United States is not interested in the controversy between the defendant Northern Pacific Railroad Company and its minority stockholders. But because those stockholders are attempting to take appeals, which, although they must inevitably be dismissed as not authorized by law, would nevertheless seriously interrupt the

District Court in its efforts to bring to a conclusion a suit of great public importance, the United States submits this memorandum in opposition to the granting of the petitions for appeal.

STATEMENT

In the absence of a record on appeal, a brief statement of the salient facts leading up to this litigation and of the relevant proceedings in the suit is submitted for the convenience of the Court.[1]

History of the Act Under Which Suit Was Brought

The suit in which the orders sought to be appealed from were made was filed by the Attorney General July 31, 1930, against the Northern Pacific Railroad Company, the Northern Pacific Railway Company, the Northwestern Improvement Company, one of its subsidiaries, and the trustees under outstanding mortgages, pursuant to the Act of June 25, 1929 (46 Stat. 41), the full text of which is quoted in the Appendix, *infra.*

The history of the Act referred to is as follows: The Act of July 2, 1864 (13 Stat. 365) and the Joint Resolution of May 31, 1870 (16 Stat. 378) made certain grants of public land to the Northern Pacific Railroad Company in aid of the construction of a railroad from Lake Superior to Puget Sound. After a railroad had been constructed, executive withdrawals of lands within the indemnity limits of the grant gave rise to a controversy between the United States and the Railway Company, successor to the Railroad Company, concerning the right

[1]Petitioners have left with Judge Wilbur a file which contains copies of some of the pleadings, motions and orders referred to herein. Unfortunately the file is not consecutively paged, and hence reference to the pages of the file cannot be made herein.

of the United States to make such withdrawals, and in a case begun about 1915, known as the Forest Reserve Case, the United States sought to cancel the patent to certain lands withdrawn for a national forest.

The decision of the Supreme Court in that case *(United States* v. *Northern Pac. Ry. Co.,* 256 U. S. 51), after stating (pages 58 to 60) the terms and history of the grants, held that "it was not admissible for the Government to reserve or appropriate to its own uses lands in the indemnity limits required to supply losses in the place limits." (pp. 66-67). The case was therefore remanded to afford the parties an opportunity to show whether there remained, after the withdrawals, sufficient public lands to satisfy all of the losses in the primary limits.

The Department of the Interior thereupon began to adjust the grant upon the basis of the Court's decision, but on June 5, 1924, the matter having come to the attention of Congress, a Joint Resolution was enacted (43 Stat. 461) suspending the adjustment and forbidding the issuance of further patents until a Congressional investigation could be had.

The Act of June 25, 1929, which resulted from this investigation, in general: (1) declared that the United States retained all withdrawn lands in the indemnity limits which at the time of withdrawal were available in satisfaction of the deficiency in the grant; (2) removed all such lands from the operation of the grant; (3) provided that the grantees should be entitled to receive compensation for such lands to the extent, if any, thereafter found to be due from the United States; (4) declared forfeit the unsatisfied indemnity selection rights and claims to

additional land; (5) authorized and directed the Attorney General to prosecute such suit or suits as might be necessary to remove the cloud cast upon the title of the United States to the land as a result of the claims of either the Railroad or Railway Company, and to have determined the controversies and disputes affecting the operation of the grants, and to obtain an accounting which would fix the amount of compensation, if any, to which the grantee might be entitled. Numerous questions to be submitted to the court were enumerated, "including the legal effect of the foreclosure of any and all mortgages which said Northern Pacific Railroad Company claims to have placed on said granted lands." In brief, the Act of 1929 provided (a) that if the grantee is entitled to any further lands, the United States would pay for them rather than convey the lands to the grantee, and (b) that it should be determined by court action whether the grantee was entitled to further lands, and, if so, the compensation that should be paid therefor. 46 Stat. 41.

Suit Filed in 1930. First Phase.

This suit was filed in the United States District Court for the Eastern District of Washington, July 31, 1930, and took the form of a bill to quiet title in the United States to approximately 2,900,000 acres of withdrawn land in the claimed indemnity limits. The bill of complaint contained (a) numerous charges of violation of the grant, (b) allegations of fraud in the performance of it, and (c) allegations of errors in its administration. Among the charges of breach of the grant were allegations that the mortgage foreclosure proceedings through

which the Railway Company had succeeded to the interests of the Railroad Company in 1896 were invalid and that such proceedings constituted, as between the Government and the Railroad Company, a breach of the terms of the grant on account of which the Company lost all right to receive further indemnity lands from the United States. A voluntary appearance was entered by all defendants. The Railway Company filed an answer which contained a general motion to dismiss and which pleaded the defenses of equitable estoppel, res adjudicata, laches, statute of limitations, and other defenses. The Railroad Company first filed a disclaimer of any interest in the subject-matter of the suit, which was later stricken on motion of the Government, and the Railroad Company filed an answer in which, *inter alia,* it adopted by reference the answer of the Railway Company.

On February 25, 1932, the trial court appointed Frank H. Graves as Special Master, and under Equity Rule 29 the defenses raised by the pleadings were called up for hearing prior to trial. Upon motion of the Railroad Company the defenses raised in its answer were also referred to the Master on May 24, 1932. After a hearing on the issues thus raised extending over a period of more than a month, the Master then filed his report on May 31, 1933, which was generally favorable to the defendants and in which he ruled that the Government was estopped from attacking the validity of the 1896 mortgage foreclosure sale. Exceptions which had been filed and argued by the parties on both sides, were overruled, and by its order of October 3, 1935, the court adopted the report of the Master "in its entirety."

Second Phase.

Thereafter, on April 21, 1936, the case was referred back to the Master, with directions to determine the lands, if any, for which the defendants are entitled to receive compensation, leaving for later determination the amount of compensation.

After a hearing which lasted for more than ten months, and on July 26, 1937, the Master filed his second report, finding that the railroad was entitled to compensation for approximately 2,400,000 acres. Again exceptions were filed to the report by the parties on both sides within twenty days after it was made, as required by Equity Rule 66.

Some Issues Remain Undetermined.

It will be noted that the report of the Master just referred to did not pass upon the amount of compensation, which remains undetermined. It was believed that it would be to the advantage of all parties to have a decision of the Supreme Court finally determining the lands for which compensation must be paid, before introduction of evidence should begin upon the *third phase* of the case, which might be called the *valuation* phase, since the appraisal of such a vast acreage is obviously an expensive undertaking. Accordingly, the Act of May 22, 1936, (49 Stat.. 1369), authorizing a direct appeal to the Supreme Court from the orders entered in the *first* and *second* phases of the case, was passed, copy of which is set forth in the Appendix, *infra.*

Petitioners' First Appearance.

It was not until after the Master's second report had been filed, and more than six years after the bill of com-

plaint had been filed that the petitioners here first made themselves known. On August 25, 1937, and after the time for filing exceptions had expired, they filed a motion to extend for thirty days the time "within which the said Northern Pacific Railroad Company may file exceptions to the report of Commissioner Frank H. Graves." Then, on September 3, 1937, and without first having obtained leave of court, petitioners filed an answer and cross-bill entitled "Northern Pacific Railroad Company by Charles E. Schmidt and other minority stockholders" in which it was generally alleged that the Railroad Company was being held "in captivity" by the Railway Company and which asked the court to determine a variety of issues with respect to the legality of the corporate organization of the Northern Pacific Railway Company and, in addition to the lands in suit, the ownership of all property held by the Railway Company.

Thereafter, on January 31, 1938, petitioners filed a motion for leave to file a petition in intervention in the cause "on their own behalf and all other stockholders similarly situated," the petition setting forth allegations which were similar to those made in the answer and cross-bill and praying for substantially the same relief. Finally, on February 19, 1938, six months after the date of the Master's second report and without first having sought or obtained leave, petitioners filed a motion "to construe, modify, and/or amend" the report which, in effect, asked the court to determine which of the two companies "is the owner and entitled to possession of the land, land grants, rights to land, property, and all other assets involved in and covered by said report." On the

same day petitioners filed their exceptions, in which they "make and adopt each and all of the exceptions to said report heretofore filed in this cause on behalf of the Northern Pacific Railway Company and Northern Pacific Railroad Company." Both the motion to extend time and exceptions were stricken from the files by the Order of March 9, 1938, referred to *infra*.

On March 9, 1938, the court entered an order striking from the files all documents filed by petitioners, including their answer and cross-bill, petition to intervene, and motion to construe the Master's report. Petitioners then filed a series of motions which, in effect, asked the court to overrule its order, and "to dismiss the original and amended bill of complaint heretofore filed." On March 22, 1938, in its order denying all of these motions the court expressly stated that his order was made without prejudice to the right of petitioners—

> to assert later in this cause, when the fund, if any, to be distributed by the United States is established and fixed, or in any other proceeding, any rights which they may have by reason of the matters and things alleged in said answer and cross-bill and in said intervening petition.

Meanwhile, the exceptions to the second report of the Master filed by the parties to the suit having come on for hearing, the court made an order, also on March 22, 1938, sustaining and overruling various exceptions and reserving ruling on others, and containing the following recital:

> It further appearing to the court that there are additional matters connected with such report of the Master, which are yet to be considered and determined by the court before the review of said report may be completed, and that for the purpose of completing the review of said report of the Master and

in order to enter an order or decree of this Court upon such review as required by the Act of June 25, 1929, and from which order or decree an appeal is authorized by the Act of May 22, 1936, it is necessary that the court make such Findings of Fact and Conclusions of Law as the Court's review of said Master's report may require;

IT IS ORDERED, that the parties hereto submit to the Court their proposed Findings of Fact and Conclusions of Law, together with their suggested draft or drafts of such order or decree.

History of Petitioners' Attempts to Appeal.

1. On March 22, 1938, the day on which the order last mentioned was signed, the present petitioners filed with the clerk of the District Court petitions for appeal[2] in substantially the same form as those filed by them in the District Court on ~~March 23~~ May 24, 1938 and which have been certified to this court in connection with the present application except that those petitions were for appeals to the Supreme Court, petitioners invoking the Act of May 22, 1936. The following day, March 23, Judge Webster allowed those petitions, but thereafter on March 30, and within the term, he made an order vacating the allowance of such appeals, reciting that "it is questionable whether said appeals and citations should have been granted," and set the petitions for hearing at a later date. Thereafter a motion was made to strike the order of March 30 vacating the allowance of the appeals and on April 30, 1938, this motion and the petition for ap-

[2]It will be noted that the minority stockholders have throughout filed concurrent petitions, in one calling themselves "Intervening Petitioners," and in the other "Northern Pacific Railroad Company, by minority stockholders." There is no claim that they are authorized to represent the defendant Northern Pacific Railroad Company, which has appeared by answer and is regularly represented by counsel.

peal, having been heard by Judge Webster, were by him denied, his order reciting:

> That the orders of the court entered on March 23, 1938, allowing said appeals, were made through inadvertence and mistake, and were improvidently granted, that the order or decree upon a review of the report of the Special Master filed July 26, 1937, from which an appeal is authorized by the Act of May 22, 1936, has not yet been made or entered; that the Northern Pacific Railroad Company is and has been since the date of the filing of its answer herein represented by counsel of record in this suit, who have not attempted to obtain any order allowing an appeal, and that counsel presenting said petitions for appeal are not authorized to represent said Northern Pacific Railroad Company or any other party to this suit.

2. Thereafter and on May 3, 1938 petitioners filed petitions in the Supreme Court without disclosing the ruling of the court below or the contents of its order of April 30, 1938,[3] which petitions were for an order allowing them a direct appeal from the orders referred to in their former petition to Judge Webster, and the petitions prayed in the alternative that the Supreme Court hold and declare that the appeal allowed by the trial court on March 23, 1938 which had been vacated and denied was "still in effect and binding and that the same be docketed." Thereafter and without opinion the Supreme Court on May 16, 1938 denied those petitions.

3. May 24, 1938, petitioners filed the petitions for appeal directed to the Judge of the District Court, and which in their original form have been certified here. Judge Webster denied the petitions June 1, 1938. Ex-

[3]We are furnishing the Court with a copy of the order and ruling.

cept that these petitions pray appeals to this court, rather than to the Supreme Court, they were in substance the same as the first petitions of March 22, 1938.

4. The petitions now presented to Judge Wilbur and now before this court pray appeals from the same orders listed in the petitions of May 24, 1938, as presented to and denied by the District Judge; but in addition thereto appeal is sought from other orders, not itemized in the petition which Judge Webster denied as follows:

In the petition of "Northern Pacific Railroad Company by Minority Stockholders," there has been added to the orders from which appeal is sought an order of March 9, 1938, "striking answer and cross-bill of Petitioner filed herein September 3rd, 1937."

In the petition of "Intervening Petitioners," there has been likewise added an order of March 9, 1938, denying "the motion to file Intervention Petition and striking Petition filed herein January 31st, 1938." This is the first and only attempt made to appeal from the denial of leave to intervene. No explanation is given as to why it is sought in these petitions thus to enlarge the scope of the petitions presented to Judge Webster.

ARGUMENT

This Court has had frequent occasion to dismiss appeals improvidently taken by counsel or allowed by the District Court. Often this action has been upon the Court's own motion. *City and County of San Francisco* v. *McLaughlin* (C. C. A. 9th), 9 F. (2d) 390; *Robinson* v. *Edler* (C. C. A. 9th), 78 F. (2d) 817. These cases suggest the duty of the court or judge to scrutinize such petitions for the reasons well stated in *Alaska Packers Ass'n.* v. *Pillsbury,* 301 U. S. 174, 177, as follows:

> The reasons for requiring that an appeal be duly applied for and allowed is that there may be some assurance that the suit is one in which there may be a review in the Circuit Court of Appeals; that the decree is of such finality or character that it may be re-examined on appeal; and that appropriate security for costs may be taken where the appellant is not by law exempted from giving such security. In this way improvident and unauthorized appeals are prevented. While an appeal in a proper case is matter of right, the question whether the case is a proper one under the law regulating appeals is not left to the appellant, but is to be examined and primarily determined by the court or judge to which the application is to be made.

For the purpose of disclosing the utter impropriety of any of the appeals sought, we shall discuss separately the orders from which petitioners seek to appeal.

1. *The order of May 24, 1932 referring the cause to a Special Master.*[4]

Such an order may not be appealed from at this time by these petitioners for:

(a) The order was made more than six years ago.

(b) The petitioners were not then, and are not now, parties to the suit, and hence have no standing to appeal.

Ex parte Cutting, 94 U. S. 14.

Ex parte Leaf Tobacco Board of Trade, 222 U. S. 578.

Ex parte Cockroft, 104 U. S. 578.

See also cases cited in *In re 211 East Delaware Place Bldg. Corporation,* 15 F. Supp. 947, 948.

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[4]That petitioners seriously undertake to appeal from this order is made manifest by the first assignment of error of "Northern Pacific Railroad Company, by Charles E. Schmidt," etc.

(c) The petitioners, even if allowed to intervene, could do so only in subordination to, and in recognition of, the propriety of the main proceeding, as intervention will not be allowed for the purpose of impeaching a decree or order already made.

Equity Rule 37.

United States v. *California Co-operative Canneries,* 279 U. S. 553, 556 and note.

Merriam v. *Bryan,* (C. C. A. 9th) 36 F. (2d) 578.

(d) An order of reference is not final and is not appealable.

Dodge Mfg. Co. v. *Patten* (C. C. A. 7th), 43 F. (2d) 472.

See *Rexford* v. *Brunswick-Balke Co.,* 228 U. S. 339, 346.

2. *The order of October 3, 1935, amended January 29, 1936 confirming the first report of the Master.* (See Assignments of Error II, IV, V, VI and VII of "Northern Pacific Railroad Company, by Charles E. Schmidt.")

Such order is not now appealable to this court, by these petitioners, for all the reasons that the order of reference, just mentioned, is not appealable (the lapse of more than two years, the petitioners' lack of standing, either as parties or interveners, and the lack of finality in the order) and also for an additional reason. This is that since this order is made appealable directly to the Supreme Court by the Act of May 22, 1936, an appeal to this court, even if the same were otherwise allowable, is thereby impliedly prohibited.[5]

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[5]Even under the Act of May 22, 1936, the direct appeal to the Supreme Court from this order may be taken only during the sixty day period following the order of the court on a review of the Master's second report, which order has not yet been entered.

United States v. *California Co-operative Canneries,* 279 U. S. 553, at p. 559.

3. (In petition of "Northern Pacific Railroad Company by Minority Stockholders.") *Orders of March 9, 1938: (a) Striking the answer and cross-bill of petitioner filed (without leave of court) September 3, 1937; (b) denying the motion to construe, modify or amend the Master's second report; and (c) striking out the exceptions of the Railroad Company (by minority stockholders) to said report.*

Item (a) has been inserted since the petition was denied by Judge Webster. How one not a party, whose answer, filed without leave of court is stricken, may appeal from such order is difficult to perceive. Even a party may not appeal from such a ruling.

City and County of San Francisco v. *McLaughlin* (C. C. A. 9th), 9 F. (2d) 390.

Ayres v. *Carver,* 17 How. 708.

United States v. *Continental Casualty Co.* (C. C. A. 2d), 69 F. (2d) 107.

Dye v. *Farm Mortgage Inv. Co.* (C. C. A. 10th), 70 F. (2d) 514.

Items (b) and (c) relate to belated attempts of these non-parties to attack the Master's report of July 26, 1937. (The so-called "Motion to construe" the report and petitioners' purported exceptions were both filed February 19, 1938, more than six months later.) Because they are not parties, they have no standing to attack the report. And even if they were parties to the suit, they could not appeal from such orders as these because they are not in any sense final.

Rexford v. *Brunswick-Balke Co.,* 228 U. S. 339, 345-346.

R. M. Hollingshead Co. v. *Bassick* (C. C. A. 6th), 50 F. (2d) 592, 53 F. (2d) 470.

Nor could the parties themselves raise any question as to the Master's report except in connection with an appeal from the order contemplated by the Act of May 22, 1936, "entered upon a review of the report of the Master." Such an order has not yet been entered, as will be pointed out more fully hereafter.

4. *Orders of March 22, 1938 (a) overruling and sustaining certain exceptions to the Master's report of July 26, 1937, and (b) denying motions to dismiss the bill and a petition to rehear the matters ruled upon on March 9, 1938.*

Particular attention is called to the order of March 22, 1938, in which the court ruled on certain exceptions to the Master's report filed by the parties to the suit, reserved ruling upon others, and directed the parties to prepare and file their proposed findings. The final paragraph of this order is quoted, *ante* p. 8. Pursuant to this order the parties to the suit have been in consultation and have been preparing proposed Findings of Fact and Conclusions of Law as well as a proposed form of an Order or Decree to submit to Judge Webster. When such order has been entered, the Government will perfect an appeal to the Supreme Court under the authority of the Act of May 22, 1936, and it is understood that the defendants will take a cross-appeal. So many diverse and difficult questions are involved, and the lands affected and to be described are so extensive and fall in so many different categories, that the labor of compiling and revising tabulations of lands and sundry findings to conform to the court's directions, is enormous. Counsel rep-

resenting all parties have been working continuously upon this task, in an effort to expedite the conclusion of the case in the District Court. Were this court to allow the attempted appeal at this premature date, the completion of the District Court's Findings may be stopped and the contemplated Order or Decree needlessly delayed, and the whole purpose of the Act of May 22, 1936, which was designed to expedite the final determination of the issues in the case, would be completely frustrated.

When the content of this order of March 22, 1938 is examined, particularly the concluding paragraphs quoted *supra,* no citation of authorities should be required to disclose that not even a party to the suit would be permitted an appeal therefrom. It is utterly lacking in finality.

Century Indemnity Co. v. *Nelson* (decided February 28, 1938) 58 S. Ct. 531, 82 L. Ed. 535.)

Walter Scott & Co. v. *Wilson* (C. C. A. 7th), 115 Fed. 284.

R. M. Hollingshead Co. v. *Bassick Mfg. Co.* (C. C. A. 6th), 50 F. (2d) 592.

Collins v. *Miller,* 252 U. S. 364, 370.

5. *The order of March 22, 1938, denying the minority stockholders' motion to dismiss the bill and their petition for a rehearing of orders of March 9, 1938.*

The attempt of one not a party to a suit, or even of one seeking to intervene in a suit, to appeal from an order denying his motion to dismiss the bill, borders on the ridiculous. The authorities heretofore cited sufficiently disclose the absurdity of this portion of the petitions.

6. (In the "Petition for Appeal of Intervening Petitioners.") *The Order of March 9, 1938 denying the motion to file Intervention Petition.*

Here for the first time in two months of fruitless applications for appeal—to Judge Webster on March 22, 1938, to the Supreme Court on May 3, 1938, and again to Judge Webster on May 24, 1938—is there any reference to an order denying intervention.

Such attempted appeal should be denied for the following reasons:

(a) The order denying the motion for leave to intervene is not an appealable order.

The question which the intervening petitioners seek to litigate in this cause is whether the property claimed by the Railway Company, including any compensation for withdrawn lands retained by the plaintiff under the Act of June 25, 1929, is in fact the property of the Railway Company or of the Railroad Company. It should be noted that no contention is made that the defendant companies are not adequately presenting their claim for lands and compensation from the United States. It is not asserted that any fund which might ultimately be distributable would be enhanced if petitioners were permitted to intervene. No reason is given why there is any necessity for the presence of the United States as a party to a proceeding to determine, as between the minority stockholders of the Railroad Company and the Railway Company, whether compensation paid by the plaintiff, if any is paid, belongs to the Railway Company or the Railroad Company.

The rule is that the granting of leave to intervene is ordinarily within the discretion of the trial court and an order denying such leave is not appealable since the petitioner is "at full liberty to assert his rights in any other appropriate form of proceeding."

Rodman v. *Richfield Oil Co. of California* (C. C. A. 9th), 66 F. (2d) 244.

Baker et al. v. *Spokane Savings Bank et al.* (C. C. A. 9th), 71 F. (2d) 487.

State of Washington v. *United States* (C. C. A. 9th), 87 F. (2d) 421.

See cases cited in *United States* v. *California Co-operative Canneries,* 279 U. S. 553 at p. 556.

An order denying intervention is appealable only when the petitioner has no "other appropriate form of proceeding" open to him, *State of Washington* v. *United States, supra,* or where there is a fund in court "which will be lost in the event that he is not allowed to intervene before the fund is dissipated." *Credits Commutation Co.* v. *United States,* 177 U. S. 311, 315, 316. No such situation exists here.

Here the question sought to be raised by the petitioners against the defendant companies can as well or better be litigated in any other appropriate form of proceeding. The fact that the minority stockholders believe they may obtain the relief they ask in other proceedings is evidenced by the fact that for thirty years they have had a case pending in the federal court in New York which they have recently had revived. The object of that proceeding is to have the "business, Railroad System, land grants and property" of the Railroad Company "restored" to it. (See Assignment of Errors No. XXI.) It is obvious that if the claim asserted by the minority stockholders is valid, it extends to all of the assets in the possession of the Railway Company. It is difficult to perceive why such a claim in which the United States has no interest should be injected into this suit which relates

solely to certain aspects of the railroad's land grant.

Judge Webster was therefore acting within his discretion when he denied petitioners' application to intervene. By his order he protected whatever interests the minority stockholders may have by providing that the order was without prejudice to the rights of such minority stockholders to assert their claims later in this proceeding or in any other proceeding. Since the order denying the application to intervene was not a denial of relief to which the minority stockholders are entitled, it is not an appealable order.

In the case of *Rodman* v. *Richfield Oil Co. of California,* (supra) this court said (pp. 251-252):

> Since the appellant does not have the absolute right to intervene, his petition necessarily falls within the category of those the granting of which lies in the sound discretion of the court. Indeed, as we shall presently see, the general rule is that the granting of a petition to intervene is discretionary.
>
> Equity Rule 37 (28 USCA § 723) provides, in part, as follows: "Anyone claiming an interest in the litigation *may* at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding." (Italics our own.)
>
> In Credits Commutation Co. v. United States, 177 U. S. 311, 315, 316, 20 S. St. 638, 44 L. Ed. 782, cited by the appellant himself, the court said:
>
> > "The question was well considered by the circuit court of appeals (91 F. 570), and we quote and adopt its statement, as follows:
> >
> > " 'When such action is taken, that is to say, when leave to intervene in an equity case is asked and refused, the rule, so far as we are

aware, is well settled that the order thus made denying leave to intervene is not regarded as a final determination of the merits of the claim on which the intervention is based, but leaves the petitioner at full liberty to assert his rights in any other appropriate form of proceeding. Such an order not only lacks the finality which is necessary to support an appeal, but it is usually said of it that it cannot be reviewed, because it merely involves an exercise of the discretionary powers of the trial court. *** It is doubtless true that cases may arise where the denial of the right of a third party to intervene therein would be a practical denial of certain relief to which the intervener is fairly entitled, and which he can only obtain by an intervention. Cases of this sort are those where there is a fund in court undergoing administration to which a third party asserts some right which will be lost in the event that he is not allowed to intervene before the fund is dissipated. In such cases an order denying leave to intervene is not discretionary with the chancellor, and will generally furnish the basis for an appeal, since it finally disposes of the intervener's claim by denying him all right to relief. The cases at bar, however, are not of that character.' ''

(b) The application to intervene was not timely made.

It was therefore not only within the discretion of the trial court to deny it—it was its duty to do so.

That therefore the appeal should be disallowed is suggested by the case of *Merriam* v. *Bryan et al.* (C. C. A. 9th), 36 F. (2d) 578, where this court said (p. 579):

> It will thus be seen that more than three years elapsed between the commencement of the principal suit and the filing of the motion for leave to intervene. The rule is well settled that applications of this kind must be in subordination to and in recog-

nition of the propriety of the main proceedings, that they must be timely made, and that they are addressed to the sound discretion of the court. Equity Rule 37; Buel v. Farmers' Loan & Trust Co. (C. C. A.) 104 F. 839, 842. The rule is well stated in the Buel Case, in an opinion participated in by Judges Lurton and Day:

> "It seems to be quite well settled that the granting leave to intervene in a case to which the petitioner is not a party is a matter addressed to the discretion of the court, to be exercised upon consideration of all the circumstances of the case. Among other things, the court will regard the seasonableness of the application, and the extent to which those already parties to the suit may be injuriously affected by admitting the new party to assert his claims and have them litigated at that stage of the case. The question for the court will be whether the petitioner has slept upon his rights and unreasonably delayed his application. Another will be whether it will be more convenient that he litigate his rights upon an independent bill."

The present application does not satisfy any of these requirements. The appellant had full knowledge of the pendency of the principal suit from the beginning, was a witness at the trial, and has offered no excuse whatever for the delay.

Petitioners claim that they "had since 1900 continuously sought a Congressional Investigation *** and *** believe they can state, without fear of successful challenge, that but for the continuous acts and efforts of the Petitioners, the Joint Congressional Committee investigation of 1925, resulting in the Act of June 25, 1929, would never have been obtained, or the act passed, or this suit authorized but for such efforts of the Petitioners *** " (Assignment of Error No. XXI). The suit con-

templated by the Act was commenced July 31, 1930, but the motion for leave to file a petition in intervention was not filed until January 31, 1938, exactly seven and one half years after the suit was filed and six months after the case had been tried to the Special Master and his report had been filed. Counsel for petitioners knew of the pendency of the suit from the time it was commenced. The delay in moving to intervene is wholly unexcused and inexcusable. Under such circumstances Judge Webster was acting entirely within his discretion in denying the request.

CONCLUSION

The cause pending in the court below is of considerable magnitude and great public importance. After a long and arduous course of litigation, the matter has reached a stage where an appeal will shortly be taken to the Supreme Court by the real parties in interest. Counsel for the parties on both sides are now diligently engaged in preparing Findings of Fact and Conclusions of Law as well as a proposed form of an Order or Decree which will be the basis of an appeal to the Supreme Court immediately following its entry. If, however, these petitioners are permitted to appeal at this premature date, further proceedings may be stopped and the contemplated Order or Decree needlessly delayed to the detriment of the public interest and the great expense and hardship of the parties.

If these petitions are granted, the remaining available remedy of a motion to dismiss the appeal would be wholly inadequate since the motion might not be decided until

the fall term. Meanwhile, the adoption of findings and conclusions and the entry of an order might not be made.

It is therefore respectfully submitted that the petitions for appeal should be denied.

WALTER L. POPE,
Missoula, Montana.
E. E. DANLY,
Washington, D. C.
Special Assistants to
the Attorney General.

APPENDIX

Act of June 25, 1929, c. 41, 46 Stat. 41:

An Act To alter and amend an Act entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific Coast, by the northern route," approved July 2, 1864, and to alter and amend a joint resolution entitled "Joint resolution authorizing the Northern Pacific Railroad Company to issue its bonds for the construction of its road and to secure the same by mortgage, and for other purposes," approved May 31, 1870; to declare forfeited to the United States certain claimed rights asserted by the Northern Pacific Railroad Company, or the Northern Pacific Railway Company; to direct the institution and prosecution of proceedings looking to the adjustment of the grant, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any and all lands within the indemnity limits of the land grants made by Congress to the Northern Pacific Railroad Company under the Act of July 2, 1864, and the resolution of May 31, 1870, which, on June 5, 1924, were embraced within the exterior boundaries of any national forest or other Government reservation and which, in the event of a deficiency in the said land grants to the Northern Pacific Railroad Company upon the dates of the withdrawals of the said indemnity lands for governmental purposes, would be, or were, available to the Northern Pacific Railroad Company or its successor, the Northern Pacific Railway Company, by indemnity selection or otherwise in satisfaction of such deficiency in said land grants, are hereby taken out of and removed from the operation of the said land grants, and are hereby retained by the United States as part and parcel of the Government reservations wherein they are situate, relieved and freed from all claims, if any exist, which the

Northern Pacific Railroad Company or its successor, the Northern Pacific Railway Company, may have to acquire the said lands by indemnity selection or otherwise in satisfaction of the said land grants: *Provided,* That for any or all of the aforesaid indemnity lands hereby retained by the United States under this Act the Northern Pacific Railroad Company or its successor, the Northern Pacific Railway Company, or any subsidiary of either or both, or any subsidiary of a subsidiary of either or both, shall be entitled to and shall receive compensation from the United States to the extent and in the amounts, if any, the courts hold that compensation is due from the United States.

Sec. 2. That all of the unsatisfied indemnity selection rights, if any exist, claimed by the Northern Pacific Railroad Company or its successor, the Northern Pacific Railway Company, or any subsidiary of either or both, or any subsidiary of a subsidiary of either or both, or by any grantee or assignee of either or both, together with all claims to additional lands under and by virtue of the land grants contained in the Act of July 2, 1864, and resolution of May 31, 1870, or any other Acts of Congress supplemental or relating thereto, are hereby declared forfeited to the United States.

Sec. 3. The rights reserved to the United States in the Act of July 2, 1864, to add to, alter, amend, or repeal said Act, and in the resolution of May 31, 1870, to alter or amend said resolution, are not to be considered as fully exercised, waived, or destroyed by this Act or the exercise of the authority conferred hereby; and the passage of this Act shall not be construed as in anywise evidencing the purpose or intention of Congress to depart from the policy of the United States expressed in the resolution of May 31, 1870, relative to the disposition of granted lands by said grantee, and the right is hereby reserved to the United States to, at any time, enact further legislation relating thereto.

Sec. 4. The provisions of this Act shall not be con-

strued as affecting the present title of the Northern Pacific Railroad Company or its successors, the Northern Pacific Railway Company, or any subsidiary of either or both, in the right of way of said road or lands actually used in good faith by the Northern Pacific Railway Company in the operation of said road.

Sec. 5. The Attorney General is hereby authorized and directed forthwith to institute and prosecute such suit, or suits, as may, in his judgment, be required to remove the cloud cast upon the title to lands belonging to the United States as a result of the claim of said companies, and to have all said controversies and disputes respecting the operation and effect of said grants, and actions taken under them, judicially determined, and a full accounting had between the United States and said companies, and a determination made of the extent, if any, to which the said companies, or either of them, may be entitled to have patented to them additional lands of the United States in satisfaction of said grants, and as to whether either of the said companies is lawfully entitled to all or any part of the lands within the indemnity limits for which patents have not issued, and the extent to which the United States may be entitled to recover lands wrongfully patented or certified. In the judicial proceedings contemplated by this Act there shall be presented, and the court or courts shall consider, make findings relating to, and determine to what extent the terms, conditions, and covenants, expressed or implied, in said granting Acts have been performed by the United States, and by the Northern Pacific Railroad Company, or its successors, including the legal effect of the foreclosure of any and all mortgages which said Northern Pacific Railroad Company claims to have placed on said granted lands by virtue of authority conferred in the said resolution of May 31, 1870, and the extent to which said proceedings and foreclosures meet the requirements of said resolution with respect to the disposition of said granted lands and

relative to what lands, if any, have been wrongfully or erroneously patented or certified to said companies, or either of them, as the result of fraud, mistake of law or fact, or through legislative or administrative misapprehension as to the proper construction of said grants or Acts supplemental or relating thereto, or otherwise, and the United States and the Northern Pacific Railroad Company, or the Northern Pacific Railway Company, or any other proper person, shall be entitled to have heard and determined by the court all questions of law and fact and all other claims and matters which may be germane to a full and complete adjudication of the respective rights of the United States and said companies or their successors in interest under said Act of July 2, 1864, and said joint resolution of May 31, 1870, and in other Acts or resolutions supplemental thereto, and all other questions of law and fact presented to the joint congressional committee appointed under authority of the joint resolution of Congress of June 5, 1924 (Forty-third Statutes, page 461), notwithstanding that such matters may not be specifically mentioned in this enactment.

Sec. 6. All lands received by the Northern Pacific Railroad Company or its successors, the Northern Pacific Railway Company, under said grants or Acts of Congress supplemental or relating thereto which have not been earned, but which have been, for any reason, erroneously credited or patented to either of said companies, or its, or their, successors, shall be fully accounted for by said companies, either by restitution of the land itself, where the said lands have not passed into the hands of innocent purchasers for value, or otherwise, in accordance with the findings and decrees of the courts. In fixing the amount, if any, the said companies are entitled to receive on account of the retention by the United States of indemnity lands within national forests and other Government reservations, as by this enactment provided, the court shall determine the full value of the interest which may be rightfully claimed

by said companies, or either of them, in said lands under the terms of said grants, and shall determine what quantities in lands or values said companies have received in excess of the full amounts they were entitled to receive, either as a result of breaches of the terms, conditions, or covenants, either expressed or implied, of said granting Acts by said companies, or either of them, or through mistake of law or fact, or through misapprehension as to the proper construction of said grants, or as a result of fraud, or otherwise, and said excess lands and values, if any, shall be charged against said companies in the judgments and decrees of said court. To carry out this enactment the court may render such judgments and decrees as law and equity may require.

Sec. 7. The suit, or suits, herein authorized shall be brought in a district court of the United States for some district within the States of Wisconsin, Minnesota, North Dakota, Montana, Idaho, Washington, or Oregon, and may be consolidated with any other actions now pending between the same parties in the same court involving the subject matter, and any such court shall in any such suit have jurisdiction to hear and determine all matters and things submitted to it in pursuance of the provisions of this Act, and in any such suit brought by the Attorney General hereunder any persons having an interest in or lien upon any lands included in the lands claimed by the United States, or by said companies, or any interest in the proceeds or avails thereof may be made parties. On filing the complaint in such cause, writs of subpoena may be issued by the court against any parties defendant, which writs shall run into any districts and shall be served, as any other like process, by the respective marshals of such districts. The judgment, or judgments, which may be rendered in said district court shall be subject to review on appeal by the United States circuit court of appeals for the circuit which includes the district in which the suit is brought, and the judgment, or judgments, of such United States

circuit court of appeals shall be reviewable by the Supreme Court of the United States, as in other cases. Any case begun in accordance with this Act shall be expedited in every way and be assigned for hearing at the earliest practicable day in any court in which it may be pending. Congress shall be given a reasonable time, which shall be fixed by the court, within which it may enact such legislation and appropriate such sums of money as may be necessary to meet the requirements of any final judgment resulting by reason of the litigation herein provided for.

Sec. 8. It shall be the duty of the Attorney General to report to the Congress of the United States any final determinations rendered in such suit or proceedings, and the Attorney General, the Secretary of the Interior, and the Secretary of Agriculture shall thereafter submit to Congress recommendations for the enactment of such legislation, if any, as may be deemed by them to be desirable in the interests of the United States in connection with the execution of said decree or otherwise.

Sec. 9. That the Secretary of the Interior is hereby directed to withhold his approval of the adjustment of the Northern Pacific land grants under the Act of July 2, 1864, and the joint resolution of May 31, 1870, and other Acts relating thereto and he is also hereby directed to withhold the issuance of any further patents and muniments of title under said Act and the said resolution, or any legislative enactments supplemental thereto, or connected therewith, until the suit or suits contemplated by this Act shall have been finally determined: *Provided,* That this Act shall not prevent the adjudication of any claims arising under the public land laws where the claimants are not seeking title through the grants to the Northern Pacific Railroad Company, or its successors, or any Acts in modification thereof or supplemental thereto.

Approved, June 25, 1929.

Act of May 22, 1936, c. 444, 49 Stat. 1369:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in the suit entitled United States of America, plaintiff, against Northern Pacific Railway Company and others, defendants, numbered E-4389, instituted and pending in the District Court of the United States for the Eastern District of Washington, under the authority and direction of the Act of June 25, 1929 (ch. 41, 46 Stat. L. 41), now on reference to a special master for hearing under an order of said court entered in said suit on April 21, 1936, a direct review by the Supreme Court of the United States by appeal may be had by any party to said suit of any order or decree of said district court entered upon a review of the report of the master to be made pursuant to said order of April 21, 1936, and also of the order or decree of said district court entered in said suit on October 3, 1935, as amended by an order of January 29, 1936. Such direct review by the Supreme Court of either or both of the said orders or decrees may be had by appeal taken within sixty days from the date of the order or decree of the district court entered upon a review of the report of the master to be made pursuant to the said order of April 21, 1936. The right of review of any final judgment, authorized by said Act of June 25, 1929, shall continue in force and effect.

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United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

No. ———

NORTHERN PACIFIC RAILROAD COMPANY, BY CHARLES E. SCHMIDT ET AL., MINORITY STOCKHOLDERS, PETITIONERS,

v.

THE UNITED STATES OF AMERICA, NORTHERN PACIFIC RAILWAY COMPANY, ET AL.

CHARLES E. SCHMIDT, ET AL., MINORITY STOCKHOLDERS OF THE NORTHERN PACIFIC RAILROAD COMPANY, PETITIONERS,

v.

THE UNITED STATES OF AMERICA, NORTHERN PACIFIC RAILWAY COMPANY, ET AL.

SUPPLEMENTAL BRIEF OF NORTHERN PACIFIC RAILWAY COMPANY AND OTHER DEFENDANTS IN OPPOSITION TO PETITIONS FOR APPEAL.

L. B. DA PONTE,
F. J. MC KEVITT,
D. R. FROST.
Attorneys for Northern Pacific Railway Company and other Defendants.

Review Publishing Co., 141 E. Fifth St., St. Paul, Minn.

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APPENDIX.

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THE UNITED STATES OF AMERICA, NORTHERN PACIFIC RAILWAY COMPANY, ET AL.

SUPPLEMENTAL BRIEF OF NORTHERN PACIFIC RAILWAY COMPANY AND OTHER DEFENDANTS IN OPPOSITION TO PETITIONS FOR APPEAL.

In the assignments of error filed by counsel for the stockholders and entitled "Assignments of Error of Northern Pacific Railroad Company by Charles E. Schmidt and Other Minority

Stockholders", statements are made in numbers III, IV, XII, XVIII and XXII alleging, in substance, that the validity of the mortgages executed by Northern Pacific Railroad Company after 1875 and the validity of the plan of reorganization and of the foreclosure sales of 1896 were not put in issue by the complaint. Also that those issues were not passed upon in the report of the Master filed May 31, 1933, and the order entered October 3, 1935. This additional brief is for the purpose of pointing out that these matters were in issue, passed on by the Master, exceptions to the rulings of the Master taken by plaintiff, and said exceptions overruled and the report adopted.

Northern Pacific Railroad Company executed six mortgages after 1875. The validity of those mortgages was put in issue by subdivisions X and XVI of the complaint filed July 31, 1930. The Master, in his report of May 31, 1933, held:

> "So far as the validity of the mortgages executed following the 1875 foreclosure are concerned, I hold that the United States has recognized them and acquiesced in and waived any possible want of power to their execution in the same maner and to the same extent as it has the foreclosure proceedings. Those mortgages were a part of that plan and inhered in its purpose and in the subsequent construction of the railroad." (p. 194)

To the above ruling plaintiff took its exception number XVII.

The validity of the plan of reorganization and of the foreclosure sales of 1896 was put in issue by subdivision XVIII of the complaint. The Master discussed the foreclosure sales and the reorganization plan on pages 195-203 of said report. On page 200 he ruled that the demurrer to subdivision XVIII should be sustained, and on page 203 he ruled that the plea of estoppel interposed to said subdivision should be sustained.

Plaintiff's exceptions number XVIII and XIX were taken to the Master's conclusion that the demurrer to subdivision XVIII of the complaint should be sustained and to his conclusion that defendant's plea of estoppel should be sustained.

As already shown, the order of the Court entered October 3, 1935, overruled all exceptions to the Master's report filed May 31, 1933, and adopted the report in its entirety.

For the convenience of the Court, we print in the appendix the Act of May 22, 1936, Ch. 444, 49 Stat. 1369, and the ruling of Judge Webster of April 29, 1938, and order entered April 30, 1938, denying the petitions of the stockholders for appeal to the Supreme Court.

Respectfully submitted,

L. B. DA PONTE,
F. J. MC KEVITT,
D. R. FROST.

June ——, 1938.

APPENDIX.

Act of May 22, 1936, ch. 444, 49 Stat. 1369.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in the suit entitled United States of America, plaintiff, against Northern Pacific Railway Company and others, defendants, numbered E-4389, instituted and pending in the District Court of the United States for the Eastern District of Washington, under the authority and direction of the Act of June 25, 1929 (ch. 41, 46 Stat. L. 41), now on reference to a special master for hearing under an order of said court entered in said suit on April 21, 1936, a direct review by the Supreme Court of the United States by appeal may be had by any party to said suit of any order or decree of said district court entered upon a review of the report of the master to be made pursuant to said order of April 21, 1936, and also of the order or decree of said district court entered in said suit on October 3, 1935, as amended by an order of January 29, 1936. Such direct review by the Supreme Court of either or both of the said orders or decrees may be had by appeal taken within sixty days from the date of the order or decree of the district court entered upon a review of the report of the master to be made pursuant to the said order of April 21, 1936. The right of review of any final judgment, authorized by said Act of June 25, 1929, shall continue in force and effect.

Approved, May 22, 1936.

Copy of Ruling made on April 29, 1938, at conclusion of hearing on petitioners' motions to strike Order of March 30, 1938, and on their petitions for appeal:

On this 29th day of April 1938 the above entitled matter coming on for hearing on the Motion of the Northern Pacific Railroad Company by Charles E. Schmidt, and

others, Minority Stockholders, and the Motion of Charles E. Schmidt, and others, as intervening petitioners to strike from the record the Order of this Court entered March 30th, 1938, the Northern Pacific Railroad Company, Charles E. Schmidt, and others appearing by Mr. Robert L. Edmiston, of Counsel, and the Northern Pacific Railway Company, and others, appearing by Mr. D. R. Frost and U. S. A. by Mr. Walter L. Pope, of Counsel, the following proceedings were had: after hearing arguments of Counsel for all respective parties, the Court announced his ruling as follows:

Judge WEBSTER. The Motion of the Northern Pacific Railroad Company, by Charles E. Schmidt, and others, Minority Stockholders, and the Motion of Charles E. Schmidt, and others, as Intervening Petitioners, to strike from the record the Order of this Court entered March 30, 1938, which motion was filed on April 18, 1938, IS DENIED, and the Order of March 30, 1938, is RE-AFFIRMED, for the reason that the Order allowing the appeal in this case was improvident and inadvertently granted. The petitions of the Intervenors for this appeal are, both denied. First, it is my opinion that there is nothing specific in the appeal that by any possibility could be construed as an appealable order in this case affecting these parties. I am also of the opinion that the record in this case, as it stands now, is not in a position to present the case on appeal to the Supreme Court of the United States, and the petitions will be denied. Now, if Counsel considers himself aggrieved by this ruling, he can take appropriate action against this Court in the Supreme Court of the United States. I will make my return to it, and the Supreme Court can decide whether this appeal can be sent up there; but my judgment is it's in no position to be sent up there, and, therefore, I exercise my discretion and refuse to do so.

Now, in looking back over this case: here is a petition in intervention filed approximately six years after this case was instituted, long after the preliminary Report of

the Special Master had been filed, long after exceptions had been taken to it by the Government on the one hand, and the Railway Company on the other; exhaustive briefs prepared, lengthy oral arguments had; a decree entered upon it, and then these intervenors seek in this very appeal they are presenting here to me to review orders that were made in these proceedings five years before this petition in intervention was filed. I think it is settled law that when one comes into a court to intervene they must accept the preceding case as they find it at the time they come in and their right to intervene is in strict subordination to the prevailing case. There can be no appeal by these intervenors from anything that this court did and entered upon the record in this Court in the form of decree prior to their coming into it. There has been no decree entered in this case since these petitioners filed this petition for intervention, and during all of these years "in captivity" that Counsel speaks of, the Northern Pacific Railroad Company filed its answer in this case six years ago this month, and there was no intervention by its stockholders until six years afterward, without a particle of explanation for the delay.

Now, in the filing of the answer in the case, surely after a case has been pending for six or seven years, and new parties come in and seek to subject themselves to the jurisdiction of the Court or undertake to file an answer, there must be some consent obtained by the Court. What about your answer? No application was made to this court for any leave to file that answer and having been filed without leave the Court strikes it.

Now, in addition to that, the exceptions that were argued and ruled upon by the Court in the order of March 9th, surely it must be plain that none but the parties to the suit can be affected by judgments, or orders or decrees in the particular litigation. I have already denied the petition to intervene in this case, and ordered this answer stricken from the record and now Counsel wants to take

exceptions to the order of the Court ruling upon the exceptions that had been filed, to which it was not a party, filed not by him at all, and in a proceeding in which he was not recognized as a party; an appeal from an order made in a proceeding in which he was not a party, and is not a party yet.

Now, that Statute that relates to this particular appeal to the Supreme Court of the United States is a special statute. It deals with a particular litigation—this litigation we are now in. In all other respects than the provisions of this Statute the appeal laws of the Country stand as they were before, and whatever that statute grants in the form of a remedy by the appeal to the Supreme Court of the United States is all that is granted by it, and there is nothing in this statute that contemplates an appeal to the Supreme Court by an intervenor in any such situation as this presented to this Court, and I am willing to present my position to the Supreme Court and let them rule on it.

MR. EDMISTON. Let the record show an exception please.

JUDGE WEBSTER. There are two petitions here for appeal, and they are both denied.

Copy of Order made on April 30, 1938, denying petitioners' Motion to Strike Order of March 30, 1938, and their petitions for appeal.

THIS MATTER came on to be heard upon the motion filed April 18, 1938, entitled "Motion of Northern Pacific Railroad Company by Charles E. Schmidt and others, minority stockholders, and motion of Charles E. Schmidt and others as intervening petitioners, to strike from the record the order of this court entered March 30, 1938," and upon the petitions for appeal to the Supreme Court of the United States entitled "Petition for Appeal of Northern Pacific Railroad Company by Minority Stockholders" and "Peti-

tion for Appeal of Intervening petitioners Charles E. Schmidt and other minority stockholders" and the court being fully advised in the premises, finds:

That the orders of the court entered on March 23, 1938, allowing said appeals, were made through inadvertence and mistake, and were improvidently granted, that the order or decree upon a review of the report of the special master filed July 26, 1937, from which an appeal is authorized by the Act of May 22, 1936, has not yet been made or entered; that the Northern Pacific Railroad Company is and has been since the date of the filing of its answer herein represented by counsel of record in this suit, who have not attempted to obtain any order allowing an appeal, and that counsel presenting said petitions for appeal are not authorized to represent said Northern Pacific Railroad Company or any other party to this suit.

IT IS THEREFORE ORDERED that said motion to strike be and the same is hereby denied, and it is further ordered that the said petitions for appeal, and each of them, be and the same are hereby denied.

DATED this 30th day of April, 1938.

J. STANLEY WEBSTER,
Judge of the U. S. District Court.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

No. 8893.

CHARLES E. SCHMIDT, ET AL., MINORITY STOCKHOLDERS OF THE NORTHERN PACIFIC RAILROAD COMPANY, INTERVENING PETITIONERS, APPELLANTS,

versus

THE UNITED STATES OF AMERICA, NORTHERN PACIFIC RAILWAY COMPANY, ET AL., APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

THOMAS BOYLAN,
Philadelphia, Pa.,
ROBERT L. EDMISTON,
Spokane, Wash.,
RAYMOND M. HUDSON,
MINOR HUDSON,
GEOFFREY CREYKE, JR.,
Washington, D. C.,
Attorneys for Appellants.

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BRIEF FOR APPELLANTS.

THOMAS BOYLAN,
Philadelphia, Pa.,
ROBERT L. EDMISTON,
Spokane, Wash.,
RAYMOND M. HUDSON,
MINOR HUDSON,
GEOFFREY CREYKE, JR.,
Washington, D. C.,
Attorneys for Appellants.

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Statutes and Resolutions

FOREWORD.

When these appellants filed their application for this appeal, which was granted, there was also filed a petition for an appeal for the Northern Pacific Railroad Company by Charles E. Schmidt and others, minority stockholders, to each of the following decrees entered in the equity cause entitled *United States of America* vs. *Northern Pacific Railway Company, et als.*, being No. E-4389 in the District Court of the United States for the Eastern District of Washington, Northern Division, on May 24, 1932, October 3, 1935, the decree amending same on January 29, 1936, March 9, 1938, and the two decrees of March 22, 1938, which said application for appeal is still pending before this Court and undetermined. Appellants and those associated with them own approximately 32559 shares of stock of the Railroad Co., the balance is owned by Railway Co. (R., ...).

In opposition to the last mentioned petition for appeal as well as the one of the intervening petitioners, which was granted, the United States filed a brief and the Northern Pacific Railway Company and others filed a brief and a supplemental brief. Thereupon, Charles E. Schmidt and others, minority stockholders, filed a point reply brief in answer to the said briefs of the Government and the railway company which is entitled, "Reply Brief of Appellants."

As the petition for appeal of the railroad company by, &c., has not been acted upon by this Court, the said "Reply Brief of Appellants" with certain changes, additions and slight curtailments is being herewith printed as part of the appellants' brief with the request that the said application be considered by the Court on the printed record along with and at the time of the hearing of the appeal on the merits, and that the said petition for appeal of the railroad company by, &c., be forthwith granted and the decrees appealed from reversed. (All italics in this brief supplied.) The said "Modified Reply Brief of Appellants" is in the appendix p 16.

JURISDICTION.

This Court has jurisdiction of this appeal under U. S. C. A. Title 28, Section 225. This Court allowed this appeal (R., 1271, 1278).

The lower court had jurisdiction of the suit under the Act of June 25, 1929, 46 Stats. 41 Sects. 1, 5, U. S. C. A. Title 43, Section 921 to 929.

STATEMENT OF PLEADINGS.

The United States filed a bill July 31, 1930 (R., 1), purporting to be a compliance with the mandate of the statute, being the Act of June 25, 1929, requiring the Attorney General to bring a suit for the adjustment of all matters between the Government and the Northern Pacific Railroad Company, Northern Pacific Railway Company and between each other and other interested parties, and all disputes which were before the Joint Congressional Investigating Committee, to make findings of fact and determine the validity of the so-called foreclosures of 1875 and 1896. The bill and subsequent amendments illegally assumed that the title of all the properties is in the Ry. Co. and asked judgment against the Ry. Co. only and did not put in issue or present for determination the so-called foreclosures of 1875 and 1896 or the disputes before the Joint Congressional Committee as directed by the Act of June 25, 1929.

This bill was amended by stipulation on June 25, 1931 (R., 228) and another amendment to the bill was filed August 1, 1938 (R., 1251, 1256). The amended and supplemental answer was filed by the railway company July 18, 1931 (R., 244).

The railway company, through its attorneys filed on January 18, 1932 (R., 417), a disclaimer for the railroad company in which it disclaimed any right, title or interest in the subject of the suit. The railway company, through its attorneys filed May 9, 1932 (R., 420) an answer for the railroad company adopting the answer of the railway company.

The cause was erroneously referred to a master on the pleadings May 24, 1932 (R., 423), and he filed his report May 31, 1933 (R., 428), to which exceptions were filed by defendants on June 20, 1933 (R., 662), and by plaintiff on July 8, 1933 (R., 664). The Court rendered an opinion on September 9, 1935 (R., 674), and in accordance therewith on October 3, 1935 (R., 680), confirmed the report and on January 29, 1936, amended said decree (R., 681). The Court sustained the motions to dismiss Paragraphs VI, VII, VIII, all of IX except the first two paragraphs thereof, all of X except the third paragraph thereof, XI, XII, XIII, XIV, XV, XVIII, XIX, XXVI, XXVII (granted on application of plaintiff,) XXVIII, XXIX, XXX, XXXI, XXXII, XXXIII, XXXV, XXXVI and XXXVIII, of the bill and sustained special pleas.

On April 21, 1936 (R., 684), the cause was referred to the commissioner for further report on the deficiencies under the grant. The commissioner filed his report thereunder July 26, 1937 (R., 690). The plaintiff filed on Aug. 13, 1937, exceptions (R., 893), and the railway company for itself and for the railroad company filed exceptions (R., 887) August 9, 1937, and supplemental exceptions August 11, 1937 (R., 891).

The railroad company by Schmidt and others, minority stockholders, on August 25, 1937 (R., 951), filed a motion to extend the time within which to file exceptions and before the motion was determined the said exceptions were filed on February 19, 1938 (R., 1185). On September 3, 1937, the Northern Pacific Railroad Company by Schmidt and others, minority stockholders filed an answer and cross bill (R., 952), putting in issue all the matters required by the Act of June 25, 1929, and asserting that all the railroad properties were and still are the property of the railroad company and no title to any of same was ever passed to the railway company. In Paragraph XXI and several others leave was asked to further answer the bill after examining the files and records of the railway and railroad companies. Plaintiff filed a motion to strike same Sep-

tember 13, 1937 (R., 1026), and the railway company for itself and the railroad company filed a similar motion September 15, 1937 (R., 1032), which the Court seemingly treated as a motion to dismiss; neither motion raised the defense of laches.

The appellants, on January 31, 1938 (R., 1936-7), filed an intervening petition and joined in exceptions filed by the railroad company by minority stockholders and motions to dismiss the amended bill and re-refer the matter to the commisisoner and construe the commissioner's report. The intervening petitoners, being the minority stockholders of the railroad company, sought the same relief that was sought in the answer and cross bill of the railroad company. The motions to strike were granted by the decree of March 9, 1938 (R., 1187), from which decree this appeal was granted (R., 1271). This was a hearing as on a demurrer and opened whole record, and the pleading first at fault is cost.

The same decree denied a motion of the rairoad company by minority stockholders and by appellants to construe, modify, and amend the second report, which motion was filed February 19, 1938 (R., 1182), and said decree also denied exceptions of the appellants and the railroad company by minority stockholders, which exceptions were filed February 19, 1938 (R., 1185). Appellants and the railroad company by minority stockholders filed on March 11, 1938 (R., 1192), a petition to review and amend the decree of March 9, 1938, which also asked leave to make the intervening petition a part of the cross bill (R., 1190). This was denied March 22, 1938 (R., 1209), after modifying the decree, through this cause: "It is further ordered that this Order shall be without prejudice to the right of said Charles E. Schmidt, George Landell, executor of E. A. Landell, deceased, Clarence Lobenthal, trustee of Bernard Lobenthal, and Walter L. Hanehnlen, themselves or as representatives of other stockholders of said Northern Pacific Railroad Company, or of such other stockholders themselves to assert later in this cause, when the fund, if any, to be distributed by the United States, is established and fixed

or in any other proceeding, any rights which they may have by reason of the matters and things alleged in said answer and cross bill and in said intervening petition.''

This decree also denied a motion of the railroad company by minority stockholders filed March 17, 1938 (R., 1207), to dismiss the original and amended bill of complaint. The questions of law involved are set out succinctly under the Points in the preceding index.

Another decree of March 22, 1938 (R., 1211) sustained Government's exceptions XII, XVI to XXVII inclusive, XXXVIII, XXXIX, XL, XLIV, XLVIII, XLIX, LV, LVI, XLIII in part, and denied Government's exceptions I, II, IV, V, sub-division (a) of III, VI, VII to XI inclusive, XIII to XV inclusive, XLI, XLII, XLV, XLVI, XLVII, L, LII, LIV, LVII, LVIII; it denied exceptions of the railway company I, II, III, IV, and sustained supplemental exceptions I and II, to the Master's Second Report. No findings of fact or conclusions of law have been filed or entered of record by the Court under either the decree of March 9 or either of the decrees of March 22, 1938.

The Government gave notice in the fall of 1937, that it would later ask leave to amend and the amendment was presented to the Court before appellants saw it and without their being present and leave was granted to file same (R., 1256) on August 1, 1938, as hereinbefore explained; the amendment assumed that the properties all belong to the railway company and not to the railroad company and prayed judgment against the railway company and not against the railroad, and the railway company had its attorneys sign a stipulation for the railway company consenting to the amendment (R., 1255); the attorneys signed as ''Solicitors for Defendants'' evidently intending to represent the railroad company.

This is another act of the railway company and its attorneys, which is very prejudicial to the railroad company and indicates an understanding or working together with the Government to prevent decision of the matters required by the mandate of the statute.

On August 29, 1938 (R., 1258), the Northern Pacific Railroad Company by minority stockholders and appellants filed their respective motions to strike out the said amendment to the amended bill, the stipulation (R., 1257) and the decree filing same dated August 1, 1938 (R., 1256).

On September 3, 1938 (R., 1240), the railroad company by minority stockholders filed a motion to dismiss, answer and cross bill to the amended bill and the amendment thereto. No motion to strike the said motion to dismiss and answer and cross bill have been filed by any of the parties hereto.

The 25 Points of Law for Argument and the Assignments of Error relied upon are hereinbefore stated and they are raised on either the rejection of the Intervening Petition, answer and cross bill, motion to dismiss, or exceptions.

STATEMENT OF THE CASE.

The Northern Pacific Railroad Company was chartered as a corporation to "have perpetual succession" by the Act of Congress of July 2, 1864 (13 Stats. 365), some of the relevant sections of which are in the record, with an authorized capital of one million shares of the par value of $100.00 each, for the purpose of building a railroad and telegraph line from a point on Lake Superior in the State of Minnesota or Wisconsin by the most eligible railroad route within the United States on a line north of the 45° of latitude to some point on Puget Sound with a branch by the Columbia River to a point near Portland, Oregon.

Section 2 enacted "That the right of way through the public lands be, and the same is hereby, granted to said 'Northern Pacific Railroad Company,' its successors and assigns, for the construction of a railroad and telegraph as proposed; and the right, power and authority is hereby given to said corporation to take from the public lands, adjacent to the line of said road, material of earth, stone, timber, and so forth, for the construction thereof. Said way is granted to said railroad to the extent of *two hundred*

feet in width on *each side* of said *railroad* where it may pass through the public domain, *including all necessary ground* for station building, workshops, depots, machine shops, switches, side tracks, turn- tables, and water stations; and the *right of way shall be exempt from taxation within the Territories of the United States.* The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the said Indians, the Indian titles to all lands falling under the operation of this act, and acquired in the donation to the (road) named in this bill."

The land and property so granted in Section 2 could not be sold, transferred or conveyed by the railroad company by deed, lease or other contract.

Section 3 granted, for the purpose of aiding in the construction of the said railroad and telegraph line, *twenty alternate sections* of public land *per mile* on *each side* of the railroad line through the *territories* and *ten* on each side through the *states* traversed, with provisions as to other lands in lieu thereof. Mineral lands were not granted but agricultural lands were granted in lieu thereof within fifty miles of the railroad; these lands granted under Section 3 could be sold by the railroad company under certain conditions.

Section 10 in part provided: "And no mortgage or construction bonds shall ever be issued by the said company on said road or mortgage or lien made in any way except by consent of the Congress of the United States."

Congress reserved the right to alter, amend or repeal the Act.

On March 1, 1869, Congress passed a resolution (15 Stats. 346, 13 Stats. 370): "That the consent of the Congress of the United States is hereby given to the Northern Pacific Railroad Company to issue its bonds, and to secure the same by mortgage upon its railroad and its telegraph line, for the purpose of raising funds with which to construct said railroad and telegraph line between Lake Superior and Puget Sound, and also upon its branch to a point at or near Portland, Oregon; and the term 'Puget Sound,' as used here and in the act incorporating said com-

pany, is hereby construed to mean all the waters connected with the Straits of Juan de Fuca within the territory of the United States."

This resolution was found to be defective and ineffective, as no authority was granted to issue the bonds or mortgages, and it was superseded by the Joint Resolution of May 31, 1870 (16 Stats. 378), which enacted: "That the Northern Pacific Railroad Company be, and hereby is, authorized to issue its bonds to aid in the construction and equipment of its road, and to secure the same by mortgage on its property and rights of property of all kinds and descriptions, real, personal, and mixed, including its franchises as a corporation; and, as proof and notice of its legal execution and effectual delivery, said mortgage shall be filed and recorded in the office of the Secretary of Interior." (The entire resolution is in the appendix hereto.) It provides that this resolution may be altered or amended but has no provision for repeal.

The Supreme Court later held that a corporation could not convey or encumber its "franchise as a corporation."

On July 1, 1870, after thorough investigations by the officials and engineers of the company and other experts that the railroad would be approximately 2,500 miles long and that it would require $50,000 per mile to build and construct, the mortgage and loans thereunder were executed and recorded, providing for $50,000 bonds for each of the 2,500 miles, being a total of $125,000,000 in bonds, of which approximately $30,780,904 were issued (R., 1100). The main line Ashland to Wallula, Cascade Branch, Pasco to Tacoma, Portland, to Tacoma and Bridges comprise 2,133.1 miles and cost $67,271,251.78 (R., 1158).

This was the only mortgage ever authorized and consented to by Congress and the execution of this mortgage and the bonds exhausted the power and authority to execute a mortgage and bonds under the statute. This mortgage was not a lien on the roadbed of 200 feet on each side of the railroad and the other land, grounds, material, and equipment granted in Section 2 of the charter act but was only a lien on the land granted by section 3 of said act and

the lands granted under the Joint Resolution of May 31, 1870.

The construction proceeded until the panic of 1873 and then there were delays, financial difficulties and extensions of time by Congress. On April 16, 1875, a suit was filed in the United States Circuit Court for the Southern District of New York entitled *Jay Cook* vs. *Northern Pacific R. R. Co,.* having for its purpose the foreclosure of the mortgage and the sale of the property, lands and assets of the railroad company, but that Court was without jurisdiction of the subject matter, as no part of the road or any of its lands or property was in New York and there was no jurisdiction of the person of the corporation as a party to the suit. The Court, though, did enter a decree of foreclosure but afterwards suspended it and it never again was put into effect nor was any action or proceeding ever taken or had under it. There was no sale or attempted sale of the properties, lands or assets of the company (R, 979).

While the suit was pending a Committee of Bondholders was formed, and it arranged for a reorganization whereby, briefly, the stockholders agreed among themselves and with the creditors and bondholders that 510,000 shares of the stock of the railroad company, which is often spoken of as the Federal corporation, would by agreement thereafter be preferred stock (R., 986) with a voting right and other preference over the common stock and the preferred stock was to be called in, paid and cancelled out of the proceeds of the sales of certain of the lands granted to the company by the Government. The remaining $49,000,000 of the stock was to be common stock (R., ...) without any other change of its status, and the preferred and common stock was exchanged for debts and obligations of the railroad company and for the 7.3% bonds issued under the mortgage of July 1, 1870, some of which bonds were put into the treasury of the company for the benefit of the preferred stockholders who had held same and who had paid debts, but the larger portion was deposited with the Farmers Loan & Trust Company for the same purpose (R., 1102).

In accordance with this arrangement and the reorganization plan, which is Exhibit F(1) to the amended bill (R., 979), which was an exchange of securities, no title or possession of the properties, lands or assets of the railroad company ever passed from it, although numerous null and void deeds were executed by the so-called Master Commissioner and the so-called receiver in said suit to the Committee of Bondbolders and by Cooke and Tower, trustees, to the Committee, set out in Paragraphs XLV, XLVI, XLVII, XLVIII, XLIX, L, LI, LII and LIII of the cross bill, and by the Bondholders' Committee to the Northern Pacific Railroad Company (R., 987 to 991).

Thereafter, the officials of the railroad company and of the railway company strenuously contended until 1924 (R., 1145), by pleadings and briefs in various suits (R., 994), some of which were sustained in various courts, as well as before Executive Departments and Congressional Committees, that there was a legal and valid foreclosure of the property, assets and lands of the railroad company in 1875, and that all right, title and possession thereto passed out of the said railroad company—the Federal corporation—and into some new company.

They also contended that the following mortgages were executed by this proposed new corporation or association or organization, the exact charater of which has never been defined or made plain. The mortgages are named and dated and identified as follows:

Exhibit G.—Missouri division mortgage, May 1, 1879 (R., 993, 1140), satisfied and released July 2, 1900.

Exhibit H.—Pen d'Oreille division mortgage, September 1, 1879 (R., 993), satisfied and released July 2, 1900.

Exhibit I.—General first mortgage, January 1, 1881 (R., 993, 1146), satisfied and released November 17, 1899.

Exhibit J.—General second mortgage, November 20, 1883 (R., 993).

Exhibit K.—Third mortgage, December 1, 1887 (R., 993).

Exhibit L.—Consolidated mortgage, December 2, 1889 (R., 993).

It is alleged (R, 1147): "In each of these so-called

mortgages, the plan of reorganization of 1875 is recited together with the averment that the mortgage is executed with the voted consent of three-fourths of the preferred stockholders as provided by that plan."

The trustee under the said mortgages, as well as the bondholders, took, accepted and received the mortgages and bonds with full knowledge of all the foregoing facts and of all the defects and invalidity of the same. The record shows under the facts alleged and the law and decisions of the Supreme Court of the United States that each and all the foregoing mortgages are absolutely null and void and were so known to be by the trustees and the purchasers of the bonds at the time of their execution, delivery and sale.

In 1924 or 1925 the *officials* of the *railway company,* who dominated, controlled and held in captivity the railroad company, whose officials were dummies of the railway company, switched completely around, and admitted and contended that there was no foreclosure of any kind, character or description in 1875, that no title or right or interest in and to the property, assets and lands of the railroad company—the Federal corporation—passed from it in 1875 but that the entire proceeding in 1875 was merely an exchange of securities.

It seems very clear from the record that it was merely an exchange of securities and the Committee of Bondholders were merely trustees or a committee who operated the road for some years.

Congress, though, by the Act of June 25, 1929, has *refused* to *accept* this *admission* of the *railway* and the *dummy railroad officials* and has *required* that the *Court* find the *facts* and *determine whether* or not there was a *valid foreclosure* in *1875* and also in *1896,* but the *Attorney General* is *persistently seeking* to avoid and *prevent* such finding of fact and determination by the Court and *has violated* the *mandate* of the statute in refusing to put same in issue, and in *assuming* that *both were valid* and *legal foreclosures* and that all the property, assets and lands granted under the Act of July 2, 1864, and the Joint Reso-

lution of May 31, 1870, and obtained otherwise and at other times by the railroad company have passed to, by good and sufficient title, and are the absolute property of the *railway company,* and the *Government* is *seeking judgment against* the *railway company* and *not* against the *railroad* company; the Attorney General has persisted in this course up to the filing of an amendment to the amended bill on August 1, 1938 (R., 1252 and 1258, 1260), and in said amendment.

While appellants believe that, under the facts alleged in the cross bill and answer and the intervening petition and the other facts shown by the record and the law applicable thereto, the so-called foreclosure proceedings and reorganization of 1875 was not a legal or valid sale or foreclosure of the property, assets and lands of the railroad company and that no title thereto passed out of the railroad company and that it was merely an exchange of securities and a temporary change of operation, yet appellants believe and contend that the *Act* of June 25, 1929, *makes it mandatory on the Court to make a finding of fact and determination of the law as to whether or not the so-called foreclosure proceedings of 1875 were legal and valid and title passed out of the railroad company.*

As this appeal is to a decree of the lower court denying leave to file the intervening petition, and as it was heard by that court and will be reviewed by this Court as on a demurrer, or rather, a motion to dismiss the intervening petition raising a question of law as to its sufficiency, the facts alleged being admitted, and whenever a cause is heard as on a demurrer under the well-known axiom, the demurrer opens the whole record and the party who was first guilty of filing a defective or insufficient pleading shall be cast.

The so-called railway company was incorporated as the Superior & St. Croix Railroad Company on March 15, 1870, naming and providing for 11 incorporators, under special act of the Legislature of Wisconsin *only* as a *local* and *state railroad* to build a line from the west shore of the Bay of Superior to the south shore of the Bay of St. Louis

to a *certain point on* the *Minnesota line* north of the Nemadji River (R., 997-8).

Contrary to and in violation of the laws of Wisconsin, which required a majority of the incorporators to constitute a quorum at the organization meeting and other meetings, six of the incorporators did not attend the first meeting of the incorporators on February 4, 1871, or any of the meetings of the incorporators or stockholders; whether all of the remaining five attended is not shown by the record, but never more than five of the eleven incorporators ever met in any meeting of the incorporators or stockholders (R., 998), and all the meetings were illegal and void.

The said Superior & St. Croix Railroad Company was never duly or legally organized and never functioned or operated as a legal corporation (R., 998).

On *October 13,* 1871, (JCC 3521, 3534-8) the railway company entered into a contract with Walbridge Bros. & Sargent to build a railroad for it from a point on the Bay of Superior to a point of connection with the Northern Pacific Railroad in Carlton County, Minnesota, at Thompson's Junction (R, 1132, 9, 1141-2). Part of the consideration for this was certain bonds issued by Douglas County and 3800 shares of the stock of the so-called railway company (R., 1142). Considerable grading was done, but *no part* of the *railroad was built,* and the work was terminated because of the depression of 1873, and because the Douglas County bonds had been illegally issued, and were void, and because it extended 9 miles into Minn. that making it an interstate road in violation of the Ry. Co. Charter which was limited to a state road.

Congress by the act of February 27, 1873 (17 Stats. 477, the act is in appendix hereto) authorized the Northern Pacific *Railroad* Company to build a draw bridge across the St. Louis River from Rice's Point, Minnesota, to Connor's Point, Wisconsin, and made it a post-route and fixed the rate for mail, troops and munitions "and the United States shall have the right of way for postal-telegraph purposes across said bridge."

On June 5, 1873 (R., 1131), the Superior & St. Croix passed a resolution to construct its branch or extension from the Nemadji River along the Bay of Superior to the end of Connor's Point and thence to the main channel of the St. Louis River and to construct or procure to be constructed from said main channel to Rice's Point in the State of Minnesota a railroad so as to form a continuous railway connection with the main line of the Lake Superior and Mississippi railroad in Duluth, and it resolved for this purpose to construct a bridge across the St. Louis River at Connor's Point to Rice's Point and it asked for leave to do so from the Board of Supervisers in the town of Superior; and on July 21, 1873, it was on motion of Mr. Canfield resolved that the plan of bridge across the St. Louis River between Rice's Point and Connor's Point prepared by Wm. Milner Roberts, Chief Engineer, and that day submitted to the Board and marked "A" be approved (R., ...). Thus the Superior & St. Croix was under its local state charter to do that which Congress had given authority to the railroad company—the Federal corporation—to do.

Minnesota by an Act of February 14, 1879 granted the Railroad Co. permission to construct, lease and operate railroads in that State—the Act is set out in full in the record (R., 1162).

On June 26, 1873, the railroad company entered into an agreement with the railway company whereby the railroad company was to build for the Railway Company (and later did build but in its own name) a railroad on the line located from the Bay of Superior to Thompson's Junction. The 3,800 shares of stock of the railway company under this agreement were transferred from Walbridge Bros. & Sargent to the railroad company, and there was paid on the said stock $56,560 prior to July 21, 1873, as admitted and testified to by Stetson, director and general counsel of the railway company (R., 1108-1110).

The said 3,800 shares of stock were voted by the railroad company at the meeting on August 31, 1880, and the

only other stock outstanding was 44 shares. These additional shares were in the name of officials of the railroad company but actually were the property of the railroad company (R., 1006). The only other stock voted at the said meeting in addition to the 3,800 shares was 12 shares, the other 32 not voting (R., 1008).

Subscribed stock of Railway could be voted whether paid for or not (R., 1109, Charter Section 9), or outstanding, but amendment of 1895 required it to be subscribed and outstanding and no business could be transacted unless a majority of subscribed and outstanding present.

After the meeting of June 26, 1873, there was no meeting of the directors or stockholders of the railway company, except a meeting of the directors on August 31, 1880, until October 18, 1895 (R., 1110).

In the meantime the railroad company had absorbed the railway company (R., 1135) and had built in its own name and on its own property the line of railroad from the Bay of Superior to Thompson's Junction as outlined in the contract with Walbridge Bros. & Sargent, as changed by the directors' meeting of June 26, 1873, so as to further locate the line along the Bay of Superior to Connor's Point, as provided in the contract with the railroad company (R., 1136-7-8) along the identical line located by the railway company (R., 1139-40).

The railway company reported on December 31, 1873, that there was built 15 3/5 miles in Wisconsin and 9 miles in Minnesota (R., 1132), and made the same report in December 13, 1874, both of which reports were false, as there was nothing done but some grading.

James Bardon, a director of the railway company, verified a statement in the Superior Times of September 4, 1880, that the charter of the railway had passed virtually into control of the railroad in 1873, and was reorgnaized for the benefit of the railroad and was essentially its line (R., 1133-4).

President Wright of the railway company (a director in 1870-1879, and president and director of the railroad

company) refused to turn in his stock and assent to the 1896 reorganization and directed his heirs not to dispose of it, as the stock would continue to have value and land value of which the so-called reorganization and fake foreclosure of 1896 could not divest it (R., 1134).

It is alleged: "The Wisconsin Special Statute of March 25, 1872, chapter 139, referring and applying to the Northern Pacific Railroad Company and the Federal Charter of the latter company, *authorized* this consolidation to be made, it aiding in the construction of the main line of railroad contemplated by Congress. Section 2 of this act is as follows:

'SECTION 2. A purchase by the Northern Pacific Railroad Company of, or the consolidation of its line with any other railroad whose line shall conform to the route above prescribed, *shall* for the purpose of this act, *be deemed equivalent* to a *construction* by said Northern Pacific *Railroad Company* of its said railroad, for such distance as the road so purchased or consolidated with shall be constructed on said route.'

"The 24 3/5 miles location of the railway company complied with the above route" (R., 1135).

Prior to January, 1873, the State of Wisconsin sued the railroad company to prevent it from cutting out Superior and putting Duluth on the main line; this suit was settled and compromised by agreement with Governor Washburn of Wisconsin in 1873, which is set out in the record (R., 1136), whereby the Northern Pacific Railroad Company agreed to build a branch from the main line on the Lake Superior and Mississippi Railroad from Duluth across Rice's Point and Connor's Point along the shore of the Bay of Superior to the Nemadji River, which the railroad built on the line that the railway had located (R., 1139-40).

Although the Douglas County bonds to the railway company had been cancelled and declared void, yet $50,000 of the bonds and other remuneration were allowed by the decree by consent to Walbridge Bros. & Sargent, but there was no order cancelling or mentioning the 3,800 shares of stock and they were left the property of the

railroad company (R., 1142) and by the Act of February 20, 1879, the $50,000 of bonds went to the railroad company as the builder of the line of railroad. (The Act is in the appendix, p. 5.)

After Section 2 quoted above and the contract with Governor Washburn, Douglas County donated certain lands to the railroad company for the construction of the 24 3/5 miles from Thompson's Junction to Superior, and 3 more miles to Connor's Point and to Rice's Point, and Congress approved the route and authorized the building of the necessary bridge by the railroad company by the Act of February 27, 1873 (17 Stat. 477: and in appendix, p. 1).

Hiram Hayes was secretary of the railway company from the beginning until February, possibly May, 1895 (R., 1111), and he was the paid attorney of the railroad company, his salary being increased to $200 per month Feb. 16, 1880 (R., 1110). He reported to President Cass of the railroad the suit to cancel the Douglas County bonds because issued without statutory authority, and suggested entering an appearance and a defense, as it was simply service by publication, but President Cass paid no attention to it and did not defend (R., 1142), because he knew of the absorption of the railway company by the railroad company and the taking over of the route of the railway company and the building thereon of the railroad by the railroad company and of the negotiations and agreements with Governor Washburn and Douglas County for the above mentioned $50,000 of bonds and the land, which was evidently in lieu of the original bonds.

It is alleged: "The item in the consolidated balance sheet of the railroad company filed by the receivers showing the condition of the trust estate October 31, 1893, was 'Sundry branch roads and surveys $263,441.05' included the railroad built by the railroad company under the contract with the railway company on the line located by the railway company from Thompson's Junction to Superior and Connor's Point" (R., 1138).

At a meeting held in October, 1880, at Superior ad-

dressed by Bardon, Shaw, Hayes, Gates and Seyer and other officials of the railway and railroad company, a resolution was passed as follows: "Resolved that we learn with great satisfaction of the efforts being made by the non-resident owners to secure a railroad for Superior, and that their action has our cordial approval, and that we promise them out hearty co-operation in their efforts looking to the end in view. Resolved, that we desire and are anxious to see the railroad line extended from the Nemadji River up along or near the westerly shore of the Bay of Superior to the northerly end of Connor's Point *on the line located by the Superior & St. Croix Company in 1873* and afterwards adopted by the Northern Pacific Company, and that owners of property to be directly benefited by such extension should be solicited at once for contributions to encourage the construction of same" (R., 1138).

Accordingly on October 16, 1880, Hayes and others sent out circular letters requesting such contributions to the Northern Pacific Railroad Company and numerous parties gave lands and money conditioned that the railroad company complete line from Thompson's Junction to Superior and Connor's Point by December 31, 1881; they are referred to as the agreements with the "Proprietors of Superior", and are now in possession of the railway company.

As alleged: "Hiram Hayes, secretary of the railway company, made an affidavit in the case of *Mylrea, Attorney General* vs. *Superior & St. Croix Railroad Company* in part as follows: 'That on or about the month of May, 1872, the said Walbridge Brothers and Sargent failed and stopped work on the construction of the proposed railroad, discharged their men and never afterwards resumed work' on their contract with the railway company, and the *affidavit shows that they had not built any road for the railway company.* The *annual report* of the railway company for the year ending December 31, *1872, did not report any road built or operated* (R., 1139).

"The railway company officials, or rather the inside officials, knew that the 24 3/5 miles from Thompson's-Junction to Superior and Connor's Point was built by the railroad company on the identical line or route located by the railway company, being the line or route on which the railroad company was to build the road for the railway

company, *but in 1896* they *secreted or hid* and *prevented* and have ever since prevented these *petitioners* and all others from *seeing the records* of the *railroad* company and the *railway* company on this matter, and having hidden, secreted and kept covered up the said records *in 1896* the said *railway company in July built 3 miles east from the Minnesota State line through Walbridge parallel to* and on the north of the *line built by the railroad company* in 1880 from Thompson's Junction to Superior and crossed it to the south at Walbridge. This *line* was *150* feet *from* the *center* of the *roadbed* of the *line* the *railroad* (company) built in 1880 or 1881 and the right of way of same was 100 or 200 feet on either side. This three miles stretch was built by the inside group of the railway company and railroad company in 1896 for the purpose of trying to make their illegal and unlawful reorganization and fake foreclosure valid and legal'' (R., 1139-40).

General Counsel Stetson, also a director, of the railway company, who helped handle all the proceedings in 1893-6, conceded in the Hoover case for the purposes of the case that the line built by the railroad company under the agreement with Douglas County was built by the railroad company upon the lines located in 1871 and 1873 by the railway company; but at a later date after Engineer Darling testified that he was unable to say whether the railroad had built on said identical line, Mr. Dunn, attorney for the railway withdrew the concession, but this was before Engineer Weeks of the railway and railroad company testified that he remembered that the route built by the railroad in 1880 and 1881 was the line located by the railway company in 1871 and 1873, and he remembered that they built right on the openings made some years prior thereto, which was the line located by the railway (R., 1140).

As alleged: ''The line built by the railroad company from Thompson's Junction to Superior and another piece built by the railroad to and along Connor's Point were both on the road or line located by the Superior & St. Croix Company, and these petitioners are informed, believe and charge that the lines so built from Thompson's Junction to Superior and Connor's Point on the line located by

the railway company and covered by the contract between between the railroad and railway companies was in May, 1882, by action of the board of directors of the railroad company, adopted as part of the main line of the railroad company'' (1141).

Johnston Livingston, stockholder and director of the railroad company in 1880 and 1881 and a director of the railway from then until 1896, testified in 1903 that he did not know that the Superior & St. Croix Railroad Company was the Northern Pacific Railway Company that in 1896 became a party to the so-called reorganization and foreclosure (R., 1142).

Stetson was attorney for Livingston in the consolidated suits, and Stetson stated in brief in Northern Pacific Securities case that the Railway Company was ''formed'' in 1896 (see below page 31).

''Because of and in view of the apparent ownership of the railway company by the railroad company in 1873 and all times thereafter and the building by the railroad of 24 3/5 miles from Thompson's Junction to Superior and Connor's Point on the identical line located by the railway company in 1871 and 1873, along which the railroad company was to build the railroad for the railway company, and the absorption of the railway company by the railroad company as hereinbefore in this paragraph set out, a paragraph was put in the *Voting Trust Agreement* of December 1, 1896, which provided:

'The term Northern Pacific Railway Company for the purposes of this agreement and for all rights thereunder including *the issue and delivery of stock* shall be taken to mean either the Wisconsin corporation of that name created by Chapter 326 of the Private and Local Laws of Wisconsin, passed 1870, and the Acts supplemental thereto, or any successor or consolidated *or other railroad corporation,* which with the unanimous approval of the voting trustees, *shall be adopted to own or operate* the railroad properties acquired under the said reorganization plan and agreement dated March 16, 1896, and to *carry said agreement into fuller effect.*' '' (R., 1143.)

J. P. Morgan, the dominating figure in the 1896 proceedings and one of the Voting Trustees, testified in 1903 that in *1896* the *purchaser* was the *''old company''*—the Northern Pacific Railroad Company (R., 1146).

There was no meeting of the stockholders or directors of the railway company from August 31, 1880, until October, 1895, but sometime prior to April 19, 1895, an application for the so-called amendment of the Superior & St. Croix Railroad Company charter, which the legislature passed April 19, 1895, was filed and it was claimed to have been made by Hiram Hayes, who was attorney for the railroad company as well as secretary of the railway company, but there is *no authority* therefor, as *Hayes did not prepare said application, had no knowledge of* the *preparation* and *did not see it until after its enactment.* It was prepared by John C. *Spooner,* who was *attorney* for the *railroad* company and the *receivers* of the railroad company, *Morgan* & Company, and for the *railway* company (R., 1111).

At a stockholders' meeting of the railway company on October 18, 1895, which sought to confirm the void and unconstitutional amended charter, and at the stockholders' meeting on July 1, 1896, the only shares present, being 43 which were the actual property of the railroad company, were voted by proxies by Spooner, Reed (Spooner's secretary) and Sanborn (Spooner's partner). The 3,800 shares of the stock in the railway owned by the railroad were not present or voted and no notice was given to the railroad company or to the receivers of the railroad company (R., 1110-11).

Hayes, by a letter with many false representations (R., 1113) had the First National Bank of Madison, Wisconsin, deliver to Sanborn the 3,800 shares of stock of the railway company, owned by the railroad company.

The said so-called amendment of April 19, 1895, was unconstitutional under Section 7 of the Constitution of Wisconsin of 1871, which prohibited the legislature from granting by special or private laws "corporate powers or privileges except for cities", because of the granting of an increase of powers, rights and functions denounced by the Supreme Court of Wisconsin (R., 1005-6-7, 1131).

Section 15 of the original charter had a capital stock

of $5,000,000, which might be increased not exceeding $10,000,000. This section in the amendment was repealed and Section 10 of the amendment amended Section 11 of the original charter permitting the stockholders to increase the stock without any limit on the amount. This is an unconstitutional grant (R., 1003-4).

The illegal and void meeting of the stockholders of July 1, 1896, with only 43 shares voting, as stated above, without any authority from the amendment, changed the name of the corporation from the Superior & St. Croix Railroad Company to the Northern Pacific Railway Company (R., 1008) and increased the capital to $155,000,000, divided into common and preferred stock (R., 1005) (R., 999, 1002, 1008).

The so-called amended charter changed the railway company from a local state railroad to an interstate railroad with claimed power to build a railway to the Pacific Ocean (R., 1007). This was such an increase of powers, rights and functions as was denounced by the State Supreme Court (R., 1005-7). There were other powers, rights and functions granted, included in this void amendment, which were unconstitutional.

The Wisconsin Supreme Court refrained from passing upon the validity of the Act of April 19, 1895, in the Mylrea case, 93 Wis. 604; 67 N. W. 1133 (R., 1000), which was a friendly suit to determine whether or not the charter of the railway company had been abandoned and we think the necessary implication from the whole opinion is that the Court would have held that the Act was invalid had it passed upon the question.

In this Mylrea case no question was raised about the failure to organize the railway company or the invalidity of the meetings on August 31, 1880, and October, 1895. Many meetings of the directors, which were held outside of Wisconsin, were invalid (R., 1006).

The Wisconsin Act of April 22, 1897, chapter 294, page 632 (R., 1103), (R., 1126-7) and of April 18, 1899, chapter 198, page 306 (R., 1129), are similarly invalid, unconstitu-

tional and void, as, while they purport to be general laws, they were merely an attempt to disguise an amendment to the charter of the railway company and their passage was obtained by the attorneys and officials of the railway company for the purpose of granting powers and rights to the railway company that were prohibited by the constitution to be granted to the railway company. They are an attempted unlawful evasion of the constitution, and they are also void and contrary to the Wisconsin constitution, Article 4, Section 18, which forbids any act containing two subjects (R., 1129-30).

William Nelson Cromwell, attorney for P. B. Winston, on August 16, 1893 (R., 1010-1058-1082), filed a stockholders' suit against the Northern Pacific Railroad Company in the Circuit Court of the United States for the Eastern District of Wisconsin, which Court, by the affirmative allegations of the bill, and no jurisdiction either of the subject matter of the suit or the person of the railroad company, as the railroad company did not own or have any lands or property within the Eastern District of Wisconsin and was not a resident thereof. The only lands and properties that the railroad company owned or had in the State of Wisconsin were in the Western District of Wisconsin (R., 1148).

William Nelson Cromwell was attorney for the Stockholders' Protective Committee, was attorney for Receivers Oakes, Payne and Rouse, attorney for Adams' Reorganization or Bondholders' Committee, and attorney for George R. Sheldon, who was a director of the railroad company, member of the Stockholders' Protective Committee and member of the firm of Sheldon & Co., for whom Cromwell filed the creditors' suit against the railroad company (R., 1082).

The Stockholders' Protective Committee was a self-constituted committee of directors of the railroad company consisting of Brayton Ives, August Belmont, George R. Sheldon, and Charlemagne Tower, who became members of the syndicate and their acts were never authorized

or approved by or with the consent of the stockholders nor were any of the reorganization plans or agreements authorized or approved by the stockholders of the railroad company (R., 1083).

The expenses of the Stockholders' Protective Committee were paid by J. P. Morgan & Company, representing the Syndicate and Reorganization Managers (R., 1182).

Cromwell was attorney for George R. Sheldon, who was a director of the company, a member of the Stockholders' Protective Committee and a member of the firm of W. C. Sheldon & Company, and Cromwell filed the creditors' suit in the name of W. C. Sheldon & Co. in the Circuit Court of the United States for the Eastern District of Wisconsin against the railroad company on..... ....., 1893 (R., 1147), which suit was entirely without jurisdiction of the subject matter or person, as was the Winston suit.

On October 18, 1893, the Farmers Loan & Trust Company filed in the same Court a foreclosure bill against the railroad company, which afterwards was consolidated with the above-mentioned suits and became known as the foreclosure proceedings of 1896 (R., 1010).

The bill states several defendants, citizens and residents of New York, and Trust Company, a New York corporation.

These bills show affirmatively that the Northern Pacific Railroad Company did not own any land or have any property in the Eastern District of Wisconsin nor were any of the lands subject to the mortgage sought to be enforced in the said Eastern District of Wisconsin.

The Winston & Company stockholders' suit and the Sheldon & Company creditors' suit were also filed in the Federal Circuit Courts in the States of Minnesota, Washington and the other states traversed by the Northern Pacific Railroad.

In the Wisconsin Court *receivers* were appointed and in the suit in the State of Washington the receivers were *removed* (69 Fed. 871), because the Wisconsin Court *ap-*

pointed them *without jurisdiction* of the *subject matter* or *person* of the corporation as shown in the affidavit of Brayton Ives, president (R., 1147).

The creditors' and stockholders' suits in Minnesota were dismissed for lack of jurisdiction (R., 1148).

The purpose of these suits in the different states was to stop and forestall Brayton Ives, as president, and his associates, from getting and taking over control of the board of directors and property of the railroad company, which they were just about to consummate (R., 1148).

The bondholders' reorganization agreement was executed February 19, 1894 (J. C. C., page 4880), and made a part of the reorganization agreement of 1896.

It is alleged in Paragraph LXIII of the cross-bill (R., 1015), which is adopted, referred to, and made a part of the intervening petition, as follows: "It was *never* the *intention* of the *officials* of the Northern Pacific *Railroad* Company and of the so-called Northern Pacific *Railway* Company to *make a bona fide sale,* of the *land, property* and *franchises* of the railroad company *in* the *1896* reorganization and foreclosure, as the reorganization agreement of March 16, 1896, * * * (J. C. C. 2846; Plaintiff's Exhibit M to the amended bill) * * * to which reference is made and it is made a part hereof, provided * * * that the old agreement of February 19, 1894, * * * was adopted into and made a part of the agreement of March 16, 1896, and it *provided* among other things, * * * that the reorganization managers could '*do whatever,* in the *judgment of the managers,* may be necessary to promote or to procure the sale as an entirety or the joint or separate sales of any lands, grants of land, property, or franchise herein concerned, wherever situated; *to adjourn any sale of any property or franchise,* or of any portion or lot thereof *at discretion;* to bid or to refrain from bidding at any sale, either public or private, either in separate lots or as a whole, for any property or franchises or any part thereof, whether or not owned, controlled or covered by any deposited security or by the bonds represented by any assenting certificate, including or excluding any particular rolling stock or other property, real or personal, and at, before, or after any sale to arrange and agree for the resale of any portion of the property which they may decide

to sell rather than to retain; to hold any property or franchises purchased by them, *either in their name or in the name of persons or corporations by them chosen for the purposes of this agreement,* and to apply any security embraced hereunder in satisfaction of any bid or toward obtaining funds for the satisfaction thereof; and the term property and franchise shall include any and all railroads, railroad and other transportation lines, branches, leaseholds, lands, rights in lands, mining rights, stocks, or other interests in corporations, in which the railroad company has any interest of any kind whatever, direct or indirect. The amount to be bid or paid by the managers for any property or franchises shall be absolutely discretionary with them; and in case of the sale to others of any property or franchises the managers may receive out of the proceeds of such sale or otherwise any dividend in any form accruing on any securities held by them.'

"At the invalid so-called meeting of the stockholders of the railway company on July 1, 1896, upon the motion of John C. Spooner, it was stated that (R., 1016): 'Whereas under the reorganization plan of March 16, 1896, *Morgan & Co. hold securities* of the Northern Pacific Railroad, which they propose to use in the purchase of the railroad, franchises, and property at the sales under the foreclosure decree or upon the request of the Northern Pacific Railway Co. in exchange for its capital stock and bonds to transfer the Northern Pacific Railroad securities to the Northern Pacific Railway Co. to enable the Northern Pacific Railway Co. to purchase at the foreclosure sale the rights, property and franchises of the Northern Pacific Railroad Co., it was resolved that the Northern Pacific Railway Co. *do enter into contracts* with J. P. *Morgan & Co. reorganization manager,* for the securities of the Northern Pacific Railroad and use these securities to purchase the railroad property and franchises of the Northern Pacific Railroad Co., and that the president and secretary of the company were authorized to attend the judicial sales and bid in the Northern Pacific Railroad property to the extent of the securities of the railroad company then controlled by the railway company, and in payment therefor to transfer and deliver any or all of the stocks, bonds, or other securities of the Northern Pacific Railroad Co.' (R., 1017).

"The above *contract* and proceedings and the contract of *July 13, 1896* (Plaintiff's Exhibit "N"), * * * between the railway company and Morgan and Co., in which it

was stated that the railway company intended to acquire the railroad company property and franchises, including the grant of the Northern Pacific Railroad Company under the said foreclosure decree, were *prior* to the *mock foreclosure sale''* (R., 1017-8).

Demurrers were filed by the railroad company in each of the suits and/or in the consolidated suit, but were never passed on (R., 1099) (R., 996) (R., 1082), as the attorneys knew that on an argument of same the suits would have to be dismissed for lack of jurisdiction of the subject matter or of the person of the railroad company.

The instigators of the so-called reorganization and of the so-called foreclosure bought off Brayton Ives, President, by taking him into the syndicate so as to get a big share of profits and of the $10 and $15 deposits per share made by assenting Railroad Company stockholders without putting up any money and Ives had the demurrers withdrawn and an answer filed for railroad company admitting all the allegations, and consenting to the proceedings and decrees of sales (R., 1082, 996); this was all done without approval of railroad company stockholders (R., ...).

Ives afterwards made oath that he could have prevented the foreclosure and not withdrawn the demurrers or filed the answers (R., ...).

On the petition of Salomon (R., 995), the *Court* specifically *refused* to *pass on* the question of *ultra vires* and *validity* of the *mortgages* and also *jurisdiction.*

As alleged (R., 995): ''The Court had previously, on April 27, 1896, in the so-called decree ordering a sale of the properties of the railroad company (which will hereinafter be shown as beyond the jurisdiction of the Court, *ultra vires* and invalid and void) reserved without passing upon the *ultra vires* and invalidity of these mortgages and also reserved without passing on the question of the jurisdiction of the Court in that cause, for the Court in the decree stated:

'XXIX. It is further adjudged, ordered and decreed that all questions not hereby disposed of, including the discharge of the receivers and the settlement of their ac-

counts, are hereby reserved for further adjudication' (R., 996).

"The *decrees* of April 27 and 28, 1896, directing sales and the decrees of July 27, 1896, confirming sales, *specifically in terms reserved* and *did not decide or dispose* of the petition pending then before the Court of the Wisconsin Central Railroad Company, Government's Exhibit 58, sub. 23, which is referred to and made a part hereof, which *specifically raised* the *jurisdiction* of the *Court* and the *validity* of the said last mentioned *six mortgages* (J. C. C. Pt. 3, pages 1408-9-11-32-33); that the said *questions* of the *jurisdiction* and *dealing* with the *validity* of the *mortgages were never determined* by the *Court* and *all* proceedings and *decrees* as to the foreclosure were by consent and *collusion* between the officials in charge and control of the railroad company and who were then, or shortly thereafter, became officials in control of the said railway company, and the bondholders and trustees, and the said *decrees* amounted to no more than *collusive agreements* which the *Court* had *no jurisdiction* or *authority to confirm,* all of which will be more fully set out hereinafter and much of which is set out in the Government's Exhibit 58, of which there are 53 sub-divisions or parts, which are referred to and made a part hereof" (R., 996, 1082, 1099).

In reading the record one is drawn to the irresistible conclusion that Judge Jenkins did not pass on any question, did not even read the decrees, and that his signature was merely a formality. The Commercial and Chronicle of May 2, 1896, stated that the *decrees* in the Northern Pacific *Railroad* Company and Reading Railroad Company suit were *signed* by the *Court* in the *exact words submitted* by *Morgan & Company.*

The so-called foreclosure decrees (J. C. C., P. 1392) illegally declared that the second mortgage was a lien on stocks and bonds that it was not a lien on (R., 1150).

The 30,000,000 acres of land west of the Missouri River (R., 1150) worth many millions of dollars, were decreed to be sold, contrary to the Joint Resolution of May 31, 1870, and also of the first section of the Act of Congress of March 1, 1893, (both of which are quoted at R., 1151).

The so-called decree of foreclosure contained this provision: "XXIV. It is further ordered, adjudged and decreed that the claims, issues and equities raised by the *Wisconsin Central Company and the Wisconsin Central Railroad Company* and the *Receivers thereof* be reserved for further consideration by the Court, and that the sale of the first parcel of said mortgages premises shall not affect such claims, issues and equities, and shall *be made subject to such further orders* or decrees as hereafter may be made by the Court in respect of all and singular such claims, issues and equities" (J. C. C., 1408).

* * * * *

"XXVI. * * * and also subject to the claims, issues and equities raised by the *Wisconsin Central Company, the Wisconsin Central Railroad Company, or the Receivers thereof,* as hereinbefore mentioned in paragraph XXIV.

"XXVII. It is further ordered, adjudged and decreed that the defendant, *the Northern Pacific Railroad Company,* at the time of the execution of any such deed or deeds of said Special Master, shall, *as a further assurance* to the grantee therein and to his successors and assigns, *execute its deed* or deeds or join with said Special Master in the execution of the deeds to be made by him, and shall thereby *convey* and *release* to such *grantee* or to his successors and assigns all of its *right, title and interest* in *such property* and *franchises so conveyed by said Special Master*" (J. C. C., 1409).

There is no allegation or anything in the entire record on which to base the above portion of Paragraph XXVII. It was absolutely beyond the jurisdiction of the Court and contrary to *Townsend* vs. *Northern Pacific.*

The advertisement under the decrees after certain description, stated that there would be sold "and all the lands, tenements and hereditaments acquired or appropriated for the purpose of a right of way for said main line and branch, and all the easements and appurtenances thereto belonging or in anywise appertaining and all the railways, ways and *rights of way, depot grounds,* tracks, bridges, viaducts, culverts, fences and other structures, wharves, docks, depots, station-houses, engine-houses, car-houses, freight-houses, wood-houses, warehouses, machine-shops, water-tanks, turn-tables, superstructures, erections and fixtures" (J. C. C., 1413).

The decree of confirmation (J. C. C., 1432) confirmed the sale, subject to all the terms, conditions, reservations and obligations in the decrees of sale, specifically mentioning the Wisconsin Central issue, and again (J. C. C., 1433) the decree "made it subject, however, to all equities reserved".

At the said sales the railway company bid $12,500,000 for property that it had agreed and admitted, and its *officials* had *sworn,* was of the *actual value of $345,000,000* as of March 16 and July 13, 1896, and President Ives testified that they were not permitted to bid over $12,500,000 because of the Wisconsin Central Railroad Company's attack on the validity of the foreclosure proceedings.

In the Winston suit in the District of Minnesota, in the sworn bill, "it was averred in connection with the land grant that if the lands could be taken into judicial custody 'the proceeds that will be received from such sales, together with the earnings of the defendant's railway system *will be more than sufficient to pay and discharge all of the defendant's obligations to its creditors, and preserve for its stockholders said railway system freed from debt'.*"

Morgan & Company, as the Reorganization Managers, became the stockholders of the railroad (except that held by the appellants and associates) and of the railway company and voted both stocks in fixing the *value* at *$345,000,000,* which was *more than $103,000,000* in *excess* of the *liabilities* and *capital* stock of the railway company. The *liabilities* were *$157,769,824.00* and the *stock* was *$84,205,446.00* (R., 1058-9). Morgan & Company as the Reorganization Managers appropriated all powers and functions of the committees and took over ownership and actual possession of the physical properties of the railroad.

The property under the so-called reorganization agreement of 1896 of the actual value of $345,000,000 was to be and was, transferred for the stocks and bonds of *some company "with or without foreclosure",* to be *either* the *railroad company* with Congressional approval and a new charter or some state company or a company to be char-

tered, but before the fake foreclosure the Superior and St. Croix Railroad Company's so-called charter was picked out and all the securities passed to it.

Twelve days after this transfer, the fake sale of $12,500,000 was carried out but the $345,000,000 of securities had been delivered and not just $12,500,000.

Later $18,000,000 of the stock of the railway company was returned to the railway company in addition to $12,036,800 (R., 1083) of stocks and bonds returned by Morgan & Company to the railway company (R., 1105).

Yet Stetson's letter of February 28, 1908 (R., 1102) stated that, "Proceeds of sale did not equal the indebtedness and the equity of the stockholders of the insolvent company (meaning the railroad company) was extinguished".

He also stated that the equity of the 7.3% bonds of 1870 were extinguished by the foreclosure in 1875; yet the railway company was carrying some of these bonds as assets (R., 1101).

The said reorganization plan of 1896 provided that it could be "with or without foreclosure".

Stetson in a brief in the Northern Securities case on behalf of Morgan stated (R., 1102): "The Northern Pacific *Railway* Company *was formed in 1896, upon* a *reorganization* of the Northern Pacific Railroad Company. Its capital stock consisted of $75,000,000 preferred stock and $80,000,000 common stock, and the *charter* provided that the preferred stock might be retired at par on any first day of January up to 1917."

As alleged (R., 1066): "In speaking, in 1903, of the agreement of July 13, 1896, Francis Lynde Stetson, general counsel and director of, and speaking for, the railway company, said that the railway company by amendment to its charter was authorized to purchase a railroad from Lake Superior to the Pacific Coast, that the only railroad answering that description was the Northern Pacific Railroad Company and that 'the *only way* of *acquiring* that *railroad* was by the *acquisition* of the *securities* then in the possession of the Reorganization Committee'." He thus admits it could not be acquired by purchase, or foreclosure, of the property, lands and assets.

In *United States* vs. *Northern Pacific Railway Company,* 256 U. S. 51, the bill alleged: "That the defendant, Northern Pacific Railway Company, is the assignee and successor in interest of the said Northern Pacific Railroad Company, to any and to all the properties, lands, rights, grants, privileges and franchises granted to said Northern Pacific Railroad Company by the Act of July 2, 1864, and by all acts supplemental thereto."

And the answer of the railway company admitted: "It is true that the Defendant is a corporation and is the *assignee* and *successor* in interest of the * * * etc."

The railway company is estopped to claim that they took title under the foreclosure or that the foreclosure proceedings were valid or passed any title, for the *railway company filed itself* and *had filed* for the *railroad company* an answer in *United States* vs. *Northern Pacific Railway Company,* 134 F. 715, the telegraph case, in which it is alleged among other things as follows:

"And these Defendants aver that the said Northern Pacific Railway Company never received any subsidy in land, bonds, or any loan of credit from the United States for the construction of any railroad or telegraph lines; that the said Northern Pacific Railway Company is not engaged in operating its said railroad or telegraph lines under any right or franchise derived from the Government of the United States or from any Act of Congress, but owns, operates and maintains the said line of railroad and telegraph under and by virtue of the laws of the State of Wisconsin, under which it was incorporated and organized, and the laws of the several States in which the lines of railway and telegraph are situate, and so these Defendants say that the said Northern Pacific Railway Company is not subject to the provisions of the said Act of Congress of August 7th, 1868" (R., 1106).

In the railway company answer in the Boyd case sworn to by Secretary Earl, June 26, 1907, it was stated (R., 1106-7: "That its capitalization was increased to $155,000,000 and that *duly and lawfully it did obtain,* and *does now hold,* a *majority* of the *outstanding* and issued *stock* of the Northern Pacific *Railroad Company,* and also substantially all of the franchises, property and assets which were formerly of the Northern Pacific Railroad Company,

except as from time to time portions of the land grant have been sold and disposed of."

In December, 1901, the railway company filed an answer in the case of *Hackett* vs. *Northern Pacific Railway Company,* in the Supreme Court of New York sworn to by George H. Earl, Secretary, in which it stated: "In July, 1896 this defendant—meaning the Superior & St. Croix Railroad that was—"at judicial sale purchased the railroad franchises, immunities and other property of the Northern Pacific Railroad Company, a corporation organized under the laws of the United States, *with the consent of the State of Wisconsin,* at a time when the respective railroads of this defendant and of the said Northern Pacific Railroad Company could be lawfully connected and operated together to constitute one continuous main line" (R., 1107).

Charles Donnelly, president of the railway company (formerly general counsel of the railway company) testifying before the Joint Congressional Committee, stated, seemingly in *contradiction* of the *Railway company's answer* in the case of *United States* vs. *Northern Pacific Railroad Company,* 134 F. 715 (above) (R., 1106), that the "obligations of the new company imposed by the original act, of course—the obligations imposed by the original act upon the old company do, of course, rest upon the new company. Whatever the old company had to do we had to do." (The old company was the railroad company, the new company the railway company) (R., 1156).

James S. Kerr, who was for many years attorney for the railway company and represented it before the Joint Congressional Committee (Part 2, (JCC p. 892)) in discussing *L. S. & M. R. R. Co.* vs. *U. S.,* 93 U. S. 442; 23 L. Ed. 965, admitted that under the *railroad company act* of July 2, 1864, the railroad became, in a sense, *an agency of the Government* and the Government reserved the right to amend the charter (R., 1157).

Kerr, testified in the hearings as follows:

"Senator Kendrick: Mr. Kerr, when those lands were sold under that foreclosure, where did the title to them then rest?

Mr. Kerr: In 1875?

Senator Kendrick: No; I mean in 1896.

Mr. Kerr: It rested in the purchaser, which was the *reorganization committee,* made up of the representatives of the holders of bonds and securities of the old Northern Pacific Railroad Co. They acquired title to them, and when the sale was affirmed, what they purchased at the foreclosure sale was conveyed to them, or assigned by them to the Northern Pacific Railway Co., and the special master and the receivers and the railroad company itself, under the direction of the court, made deeds to the Northern Pacific Railway Co., the Wisconsin corporation'' (R., 1161).

This evidences that there *were secret agreements, arrangements,* plans and *transactions* in *1896* in the so-called reorganization and fake foreclosure *that are still secreted, hidden and covered up by* the officials of the railway company and other parties thereto.

Attorneys advising him in *1896* told *Morgan* that the *1896 proceedings* were not legal or valid and *did not pass title,* but *Morgan instructed* them to *proceed* with the so-called reorganization plan and foreclosure and that *he* would *be responsible* for it and *protect everyone.* When it became necessary, he would *revamp* the *situation so* as to *make* it *legal.* In a nut shell, all the transactions of 1896 were nothing more or less than the *word and fiat of Morgan & Company* and were solely to get out a new lot of securities which could be marketed by *virtue* of the *Morgan name.* Therefore, *Morgan,* to *protect himself, had* the foregoing *reservations* put in the *Voting Trust* and the following reservations put in the *new mortgages.*

The nomination of Bryan at the convention that convened in Chicago July 7, 1896, possibly caused the Managers to rush into the contract, transfer and conveyances of July 13, 1896, and to get the so-called deal and foreclosure through and consummated before the election.

The Railroad Co. has held stockholders meetings annually from 1896 to 1938, attended by appellants or associates and our associates of appellants Charles Fearon made affidavit on January 28, 1932, at request of and on behalf of the United States filed in this suit and later on

April 21, 1932, testified both as witness before the Commission for the Government and the Railway Company in part as to the affidavit, the Reorganization of 1875 and the so-called Reorganization of 1896.

Geo. H. Earl, Secretary of the Railway Company, in 1903 said, "The matter (meaning satisfying or paying the non-assenting stockholders) should have been closed up long ago and would have been but for bad advice."

Earl had been an official of railroad company many years prior to 1896.

The two mortgages dated November 10, 1896 contained these provisions: "And whereas, prior to such sales and conveyances, and for the purpose of enabling the Railway Company, party of the first part hereto, to make payment for said railroad and telegraph lines, franchises, lands, land grants, rights to land, stock, bonds and other properties, and of procuring the execution and delivery of the bonds hereby secured, as hereinafter provided, and for other purposes, the *firm of J. P. Morgan & Co.,* of the City of New York, acting as *Reorganization Managers* under a certain Plan and Agreement dated March 16, 1896, for the Reorganization of the Northern Pacific Railroad Company, sold, transferred, and delivered to the Railway Company, party of the first part hereto, General First Mortgage Bonds, General Second Mortgage Bonds, General Third Mortgage Bonds and consolidated Mortgage Bonds of said Northern Pacific Railroad Company, together with certain other securities and property, *upon the express promise and agreement of the Railway Company,* among other things, to execute and deliver this mortgage or deed of trust, covering, as hereinafter set forth, the railroad and telegraph lines, property, franchises, lands, rights to lands, stocks and bonds acquired at said sales, and certain other properties now owned or hereafter to be acquired by the Railway Company, and to make, execute, deliver and use, as hereinafter provided, its bonds secured by this indenture;"

* * * * * *

ARTICLE TWELVE.

* * * * * *

"SEC. 4. For every purpose of this indenture, including the execution, issue and use of any and all bonds hereby secured, *the terms* 'Railway Company' and 'North Pacific Railway Company' *include* and *mean not only* the party of the first part hereto, *but also* any such *successor corporation,* formed under the *laws* of the *United States* or of any State or States thereof. Every such successor railroad corporation shall possess and from time to time may exercise each and every right and power hereunder of the Northern Pacific Railway Company, in its name or otherwise.

"SEC. 5. Any act or proceeding by any term of this indenture or any bond or resolution herein recited, required or provided to be done or performed by any board or officer of the Railway Company, shall and may, in event of any change in its existence, be done and performed with like force and effect by the like board or officer of any railroad corporation that shall at the time *be lawful sole successor of the Railway Company.*"

The paragraph from the Voting Trust Agreement is stronger than this. They were still hoping to have passed the Northern Pacific Railroad Company new charter then pending in Congress, which provided for the passing of title and all property and rights of property, assets, franchises, powers, and liabilities of the railroad company to the new corporation which was to be the railroad company reorganized (R., 1084-9).

As alleged: "These petitioners are informed, advised and charge that the *officials* and *directors* of the *railroad* and *railway* companies and other parties to the reorganization and the fake foreclosure of 1896, as various of them *stated at the time,* felt that the said so-called reorganization and fake foreclosure were or would be held and treated by the Courts as well as the United States to be invalid and void and that *no title* or right of possession *to any* of the *land, property,* stocks, assets, securities, or bonds had *passed from* the *railroad company,* and this *voting trust was organized* and the *above paragraph* (R., ...) *inserted* in it *enable* the *trustees* under the voting trust *to resume* the *conduct* of the *property under* the *name* and *charter* of the *railroad company without any further proceedings whatever;* this *Court can* now and it *is* its *duty* to *declare* and

decree that *title to* and *right* to *possession* of all the *lands, properties,* franchises, assets, stocks, bonds and securities of the *railroad company* unlawfully taken into custody and possession, as hereinbefore alleged, by the railway company and the voting trustees, was in 1896 and has been at all times and *still is in* the *railroad company* (R., 1144).

"Although the railway attorneys filed an answer for the railroad company disclaiming any interest, yet it has put evidence in the record in this cause showing so many of the illegalities and wrongs committed in 1896, that the Court cannot make a true, just, equitable and complete decision and decree without determining most, if not all, of the very questions raised in this petition and cross bill. The railway company having thus presented the matter, such determination is mandatorily required by the statute of June 25, 1929" (R., 1144).

The so-called Reorganization Agreement of 1896 provided that the stockholders of the railroad company should turn same in and deposit $15.00 for each share of common stock and $10.00 for each share of preferred stock to enable the holder to obtain a share of the railway company stock for each share so deposited. This was illegal and invalid and void and not enforceable and could not be required, as they falsely stated that the money was to be used for working capital for the railway company, whereas not one cent of it was to go to the railway company or the railroad company, but all of it went to the members of the syndicate. That such deposits did not go to the railway company was evident by that company's report to the State of Montana for and to July 13, 1896 (the date the securities were transferred) showing that its capital stock actually paid in money was $4,300 and that its only cash assets were $4,100.

The Wisconsin Statute, Section 1751, in force in 1896 prohibited such a transaction for the railway company stock, as it provided: "No corporation shall issue any stock or certificate of stock except in consideration of money or labor or property estimated at its true money value actually received by it equal to the par value thereof," etc.

"In the Syndicate contract of March 16, 1896, para-

graph 7, it is provided that the new stock is to be offered to the stockholders of the Northern *Pacific Company* whilst the assessments are to be paid by stockholders of the Northern Pacific *Railroad Company*'' (R., 1092).

''There is nothing in any of the agreements or negotiations to show who or what the *Northern Pacific Company* was or is. It is one phase of the transaction still secreted and covered up by the officials of the railway company as part of its illegal and unlawful scheme set out herein, and which petitioners after diligent efforts and research have not been able to discover and unravel (R., 1092).

''That the entire stock issued by the said Wisconsin corporation, known as the Northern Pacific Railway Company, is held and possessed by a Voting Trust organized in 1896'' (R., 1092).

As alleged: ''Under the 1896 plan the so-called deposit of $10 and $15 by railroad stockholders was not authorized or required by the Directors or stockholders of the railroad or railway companies or by a Court, but was required only by the Syndicate Members and the Managers, and the deposits went solely to the Syndicate Members for their expenses and profits, without any benefit or advantage to the creditors or stockholders of the railroad company or the railway company or to rehabilitate the railroad company; * * * '' (R., 1089).

The plan required the depositors thereunder to ''sell and assign their deposited stock to Morgan & Company, Reorganization Managers'' (R., 1103). This assignment was not to the railway company. The agreement required the managers to acquire all the outstanding stock and bonds and the syndicate getting the deposit was enabled to get new stock of the railway company of the par value of $27,788,800 for $4,030,285, or $23,758,515 less than par (R., 1092).

Morgan, as Reorganization Manager and a stockholder, agreed to acquire $9,100,000 non-assenting stock outstanding September 1, 1896, after the time the stockholders under the plan could deposit had expired (R., 1067). Instead of acquiring it and in place thereof, Morgan turned back to the railway company $18,000,000 of its stock and

$12,036,800 of stocks and bonds on April 29, 1897 (R., 1105).

Morgan & Company required the railway company to give them an indemnifying bond and relieve them of all liability, which the railway company did (R., 1077), and the railway company also assumed the liability of Morgan & Company (R., 1080).

Between September 1, 1896, and June 30, 1897 (R., 1070), the railway company took up 9,000 shares of the railroad company stock of the value of $900,000 and issued prior lien bonds in the amount of $996,000 "in exchange for property".

President Donnelly of the railway company testified before the J. C. C. that the stockholders of the railway company and the railroad company were substantially the same, and the holders of securities of the railway company and the railroad company were substantially the same (R., 1156).

In every annual meeting from 1898 to 1937 these appellants and those associated with them, non-assenting stockholders, have protested the 1896 so-called reorganization and so-called foreclosure and have urged redress therefrom. Copies of the resolution are in the record (R., 1045, 1047).

On November 20, 1900, Joseph Hoover, who was associated with these appellants, filed a suit in the Circuit (now the District) Court of the United States for the Southern District of New York against the railway and railroad companies, Morgan and the Voting Trustees, and others, attacking the said so-called reorganization and foreclosure (R., 1044), in which suit a great many depositions were taken and which is still pending and undetermined and it is alleged that the railway company never wanted it tried (R., 1051). There were many negotiations for settlement until after 1920.

Shortly after this Hoover suit was instituted Mr. John G. Johnson and Judge Joseph P. McCullen, attorneys for

the plaintiff, realized that they would never obtain all the facts and get all the relief until there was a Congressional investigation and an Act of Congress consenting that the United States be sued or be made a party to the suit, as its rights were so vitally affected in the transactions and property (R., 1051).

Mr. Johnson died April 14, 1917, and Judge McCullen died December 2, 1929, five months after the Act of June 25, 1929, passed.

The reservation keeping open the ownership of the properties in the Act of July 1, 1898, was due in part to the urgings and efforts of the appellants, their associates and attorneys, who were then seeking a Congressional investigation and Federal aid. These appellants, their associates and attorneys were continuous and persistent in such efforts annually until they obtained the Act of 1929.

Mr. Johnson and Judge McCullen were too good attorneys to permit their rights to be lost by laches.

Judge McCullen, counsel for the non-assenting stockholders, on March 20, 1908, addressed the Senate Pacific Railroad Committee urging passage of Senator Hepburn's pending resolution of February 6, 1908, providing for such Congressional investigation. (This address is published in J. C. C. 1645.)

This resolution is in Appendix, p. 14, and was favorably reported by the Senate Committee April 7, 1908, after cutting out the whereas clauses and the words "the matters herein referred to" and inserting in lieu of the latter the words "all matters relating to the reorganization of the Northern Pacific Railroad Company", and also omitting the word "so-called" in the third line below. A resolution of February 5, 1907, is in the appendix (p. 11).

The attorneys and appellants and associates vainly sought help from the railroad company for such an investigation and they persistently and continuously worked and fought for such an investigation and statute, and their efforts were crowned by the investigation held by the Joint

Congressional Committee, which resulted in the Act of June 25, 1929. But for the action and efforts of the appellants and associates and attorneys the investigation and statute would not have resulted (R.1944).

After the passage of the act and before the suit, the appellants, their associates and attorneys were conferring with and assisting and furnishing information to the Government attorneys and continued to do so after the institution of the suit.

On November 2, 1931, at the request of the Government attorneys, one of the minority stockholders, Charles Fearon, executed for the Government an affidavit which was filed in this suit and likewise another affidavit on January 28, 1932, and on April 21, 1932, Fearon was called and used as a witness, both by the Government and the railway too before the Special Master, testifying as to the Northern Pacific Railroad Company as reorganized in 1875, the stock of said corporation, the stock owned by the witness and others, as to whether or not any threats had been made against the railroad.

During all this period and at this time and until shortly before or after Mr. McGowan withdrew as attorney for the Government, the appellants, their associates and attorneys were led to believe that all rights of the minority stockholders and of the railroad company and all the matters before the Joint Congressional Investigating Committee, including the validity and foreclosure of the mortgages, would be heard and determined in this suit.

In 1896 and afterwards the railway company construed the transaction to be merely an exchange of securities, or a sale of the securities of one company for the securities of another company without any reliance on the so-called foreclosure; a party's construction of a contract when made is binding on him afterwards (R., 1104).

SPECIFICATION OF ASSIGNED ERRORS RELIED UPON.

Each of the 34 assignments of error are relied upon and are discussed in the brief along with the 25 Points of law, and all are found in the record in order (R., 1217 to 1232-3-4), and in the Appendix in order (p. ....).

In the front of this brief each of the Points is set out verbatim, accompanied with a copy or reference to the assignments of error discussed with; the other assignments are referred to.

ARGUMENT.

POINT I.

The Act of June 25, 1929, is a mandate requiring a finding of fact and decision by the Courts of all those disputes mentioned in Section 5 and the Courts must determine them on the cross bill as well as the intervening petition.

This Point is considered in connection with the assignments of error XIX and XXII, which are as follows:

XIX.

The Court erred in its Decree of March 22nd, 1938, in denying on the merits, and not striking the Motion to Dismiss the Bill and (965) Amended Bill of Complaint, which Motion was filed by the Northern Pacific Railroad Company by Charles E. Schmidt and Minority Stockholders, March 17, 1938, and in not granting the Motion and giving leave to and requiring the plaintiff to file an Amended Bill putting in issue the validity of the foreclosure of the mortgages claimed to have been executed by the Railroad Company and the other matters required by the mandate of the Act of June 25, 1929, as set out in part in the said Motion, and as shown by the said Act.

XXII.

The Court erred in refusing to hold that as alleged in the answer and cross-bill and intervening petition, and admitted, that when Congress passed the Act of June 25, 1929, it made it mandatory on the Attorney General, and

the Court, to have determined in the suit under proper allegations in the bill of complaint, all the rights of the Northern Pacific Railroad Company, and the Northern Pacific Railway Company, as is shown by Chairman Colton's Report for the committee to the House, and as these matters were purposely left open for future determination by Act of July 1, 1898 (30 Stats. 620), and by the said Act Congress purposely agreed and gave its consent for the United States to be sued or to be a party to litigation between the Northern Pacific Railroad Company and the Northern Pacific Railway Company, as *Congress construed* the Act of July 2, 1864, and the Joint Resolution of May 31, 1870, to make it *mandatory* that the *United States be a party to all suits* and litigations involving the land, land-grants and mortgages authorized thereunder, and that such rights could not be determined in any other litigation, as the United States could not be made a party to any other such litigation.

The Act of June 25, 1929, provides:

Sec. 5. The Attorney General is hereby authorized and *directed* forthwith to institute and *prosecute* such suit, or suits, as may, in his judgment, be required to remove the cloud cast upon the title to lands belonging to the United States as a result of the claim of said *companies,* and to have all said controversies and disputes respecting the *operation* and *effect* of said *grants,* and *actions taken* under them, judicially determined, * * * . In the *judicial proceedings* contemplated by this Act there *shall be presented,* and the court or *courts shall consider,* make findings relating to, and determine * * * including the legal effect of the foreclosure of any and all mortgages which said Northern Pacific Railroad Company claims to have placed on said granted lands by virtue of authority conferred in the said resolution of May 31, 1870, * * * the United States and the Northern Pacific Railroad Company, or the Northern Pacific Railway Company, or *any other proper person, shall be* entitled to have heard and determined by the court all questions of law and fact, and all *other claims* and matters which may be *germane* to a full and *complete adjudication* of the respective rights of the United States and said companies, or their successors

in interest under said Act of July 2, 1864, and said joint resolution of May 31, 1870, and in other Acts or resolutions supplemental thereto, and *all other questions of law and fact presented* to the joint congressional committee appointed under authority of the joint resolution of Congress of June 5, 1924 (Forty-third Statutes, page 461), *notwithstanding that such matters may not be specifically mentioned in this enactment.*

The hearings of the Joint Congressional Committee in 15 volumes consisting of more than 5,000 pages had evidence and contentions on all of the various questions and controversies as well as others set out in the cross-bill and answer of the Railroad Company by Minority stockholders and in the intervening petition of the appellants. Quotations from Committee report are in Appendix, p. 23.

With this point there will also be considered Assignments of Error Nos. 2 (R., 1217) and 3 (R., 1218) and 4 (R., 1218) (which are set out in the Appendix, p. 71).

The Special Master, in his first report (R., 1201) stated: The government neither by the Bill nor in argument is attempting to set aside the decrees of foreclosure or the sales had under those decrees."

In the face of that how can it be contended that the validity of the foreclosure was in issue before cross-bill filed?

As set out in the statement of the case the above matters required and directed by the statute have not been put in issue and while the court might not voluntarily as a matter of policy decide and determine such matters yet it is obligatory for the court to do so when Congress so directs.

The Courts have nothing to do with the policy of handling land grants or affecting land grants, railroads and other institutions but that is solely for Congress.

"This Court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and having done this, its duty ends." *U. S.* vs. *Butler,* 297 U. S. 1; 80 L. Ed. 477; 56 S. C. 312.

Congress can always call on the Courts and the executive officials for information and facts to assist it in future legislation.

The books are full of cases where Congress has required the Court of Claims to make findings of fact for the guidance of Congress in some particular matter especially relating to public lands and to the Indians. The Court in this cause has not made a finding of fact as required by the Act or by the Equity Rules. *Century Indemnity Company* vs. *Nelson,* 303 U. S. 213; 82 L. Ed. 535.

McLennan vs. *Wilbur,* 283 U. S. 414; 75 L. Ed. 1148, held that "Authorized and directed" in a statute to be mandatory and "authorized" alone in another section is not necessarily mandatory, but *Red Canyon Sheep Company* vs. *Ickes,* 98 F. (2d) 308; 68 Apps. D. C. ....; 66 W. L. R. 566, 568, held that "authorized" is mandatory in some statutes and cites several decisions.

The Ronde case, 7 F. (2d) at 981, quoted and followed *Supervisors* vs. *U. S.,* 4 Wall 435; 18 Fed. 419.

In *U. S.* vs. *Union Pac.,* 98 U. S. 569; 25 L. Ed. 143, the Statute provided that "The Attorney General shall cause a suit in equity to be instituted" and the Court, at p. 608, 152, said, "The proceeding is one which the Attorney General is *peremptorily* ordered to bring", and states he had no "discretion" in the matter.

(See further quotations from the opinion and copy of statute in Appendix, p. 65.)

Had the Act used the word "May" instead of "directed and authorised", it would still be mandatory under the settled rule in the Federal courts.

In *Supervisors Rock Island Company* vs. *United States, ex rel. State Bank,* 71 U. S. 435, 4 Wall. 435, 18 L. Ed. 419, the Court at 422 said and held: "That act declares that 'the board of supervisors under township organization, in such counties as may be owing debts which their current revenue, under existing laws, is not sufficient to pay, *may,* if deemed advisable, levy a special tax'."

* * * * *

"The counsel for the respondent insists, with zeal and ability, that the authority thus given involves no duty; that it depends for its exercise wholly upon the judgment of the supervisors, and that judicial action cannot control the discretion with which the statute has clothed them. We cannot concur in this view of the subject. Great stress is laid by the learned counsel upon the language 'may, if deemed advisable', * * * which accompanies the grant of power and, as he contends, qualified it to the extent assumed in his argument.

"In *King* vs. *Inhab, of Derby,* Skin. 370, there was an indictment against 'divers inhabitants' for refusing to meet and make a rate to pay 'the constables tax'. The defendants moved to quash the indictment, 'because they are not compellable but the statute only says that they may, so that they have their election, and no coercion shall be'. The Court held that 'may' *in the case of a public officer,* is *tantamount* to *'shall',* and if *he does not* do it, he *shall* be *punished* upon an information, and though he may be commanded by a writ, this is but an aggravation of his contempt.

"In *Rex and Regina* vs. *Barlow,* 2 Salk. 609, there was an indictment upon the same statute, and the same objection was taken. The court said: 'When a statute directs the doing of *a thing for the sake of justice* or the public good, the word 'may' is the same as the word 'shall'; thus, 23 Hen. VI, says 'the sheriff may take bail'. This is construed he shall, for he is compellable to do so.'

"These are the earliest and leading cases upon the subject. They have been followed in numerous English and American adjudications. The rule they lay down is the *settled law of both countries.*

"In *Mayor of N. Y.* vs. *Furze,* 3 Hill 614, and in *Mason* vs. *Fearson,* 9 How. 248, the words, *'it shall be lawful'* were held also to be *mandatory.* See *Atty. Gen.* vs. *Lock,* 3 Atk. 164; Blackwell's Case, 1 Vern. 152; Dwar. Stat. 712; *Malcom* vs. *Rogers,* 5 Cow. 188; *Newburg T. Co.* vs. *Miller,* 5 Johns. Ch. 113; *Js. of Clark Co. Ct.* vs. *T. Co.,* 11 B. Mon. 143; *Minor* vs. *Mech. Bank,* 1 Peters 64; *Com.* vs. *Johnson,* 2 Binn. 275; *Virginia* vs. *Justices,* 2 Va. Cas. 9; *Ohio ex rel.* vs. *Gov. Chase,* 5 Ohio St. 53; *Coy* vs. *Lyons,* 17 Iowa 1.

"The conclusion to be deduced from the authorities is that where power is given to public officers, in the language of the act before us, or an equivalent language—whenever the public interest *or individual rights call for*

its exercise—the language used, though *permissive* in form, *is in fact peremptory. What they are empowered to do* for a *third person,* the *law requires shall* be done. The *power* is *given, not* for *their benefit, but* for *his.* It is placed with the depository to meet the demands of right and to prevent the failure of justice. It is given *as a remedy to those entitled* to invoke its aid and who would *otherwise be remediless.*

"In all such cases it is held that the intent of the legislature, which is the test, was not to devolve a mere discretion, but to impose 'a positive and absolute duty'."

POINT 2.

Any and all defenses or contentions of laches have been eliminated by the Act of June 25, 1929, as well as by the Act of July 1, 1898 (30 Stats. 620),

Assignment of Error X is considered with this point. (See Appendix.) The Act of July 1, 1898, recognized that there was a dispute and question as to the validity of 1896 so-called foreclosure and reorganization but Congress was not ready at that time to have the disputes determined and passed the said Act, leaving the matter open and reserving the right of all parties, but specifically refusing to recognize any rights of the railway company to the property.

At that time counsel for appellants and associates were seeking relief through Congress, and otherwise and the Act of 1898 is a result of their efforts and urgings. The said Act, so far as applicable, is as follows: "And provided further, That nothing herein contained shall be construed as intended or having the effect to recognize the Northern Pacific Railway Company as the lawful successor of the Northern Pacific Railroad Company in the ownership of the lands granted by the United States to the Northern Pacific Railroad Company, under and by virtue of foreclosure proceedings against said Northern Pacific Railroad Company in the courts of the United States, but the legal question whether the said Northern Pacific Railway Company is such lawful successor of the said Northern Pacific Railroad Company, should the question be raised, shall be determined wholly without reference to the

provisions of this act, and nothing in this act shall be construed as enlarging the quantity of land which the said Northern Pacific Railroad Company is entitled to under laws heretofore enacted." (30 Stats. 620.) See also Senate Resolutions Nos. 247 in 1907, and 93 in 1908, Appendix, pp. 11, 14.)

Congress did not direct the Court to find laches, but to make findings of fact, which are to aid Congress in future legislation.

When any dispute or controversy cannot be settled by litigation unless the United States is a party to such litigation, there is no such thing as laches chargeable to anyone until after the United States gives its consent to be made a party to such litigation.

U. S. vs. *Union Pacific R. R. Co.,* 98 U. S. 569; 25 L. Ed. 143, clearly sustains this point. Not only as to elimination of laches, but also multifariousness and kindred defenses, for there the Court, after setting out and discussing a somewhat similar, but not as complete, Act as the 1929 Act, said: "We are of opinion, therefore, that the Act under which this suit is brought was not intended to change the *substantial* rights of the parties to the suit which it authorized, and that it was intended to *provide* a *specific method of procedure,* which, by *removing restrictions* on the jurisdiction, processes and *pleading* in ordinary cases; would give a larger scope for the action of the court, and a more economical and *efficient remedy than existed before;* and that it is a valid and constitutional exercise of legislative power."

The *reservation* keeping open the ownership of the properties in the *Act of July 1, 1898,* was *due* in part to the *urgings* and *efforts* of the *appellants,* their *associates* and *attorneys,* who were then seeking a Congressional investigation and Federal aid. These appellants, their associates and attorneys were continuous and persistent in such efforts *annually* until they obtained the Act of 1929.

Fuller quotations from the decision, as to this point and sustaining in effect the right of the Union Pacific to file a cross-bill and as it failed to do so, the then right of innocent minority stockholders to do so, are in the Appendix (p. 65).

POINT 3.

Any and all defenses or contentions of laches have been eliminated by the continual protests and seeking of relief by appellants at every annual meeting of the railroad from 1898 to 1938 and by the Hoover suit filed in their behalf in 1900 and still pending and undetermined.

This point will be considered in connection with assignment of error XVIII (R., 1226) and XXI (R., 1228) which set out some of the facts and the others are found in the statement of the case above and in the record (R., 1044-5-6). These assignments are in the Appendix, pp. 77, 79.

Neither the Railway or Government moved to dismiss the Cross-bill, because they knew under *Southern Pacific* vs. *Bogert,* laches are not applicable to present allegations, but the Court raised the question itself, and then stated the Court did not think Congress meant for that Court to do so much work. Maybe the work involved influenced the Court as much or more than laches. Anyway, had the Court given some study to the matter it would have soon discovered that there is no merit in the defense of laches to the Petition or Cross-bill.

The United States Supreme Court, in *Southern Pacific Co.* vs. *Bogert,* 250 U. S. 483; 63 L. Ed. 1099, found and determined as follows:

"First. The Southern Pacific contends that plaintiffs are barred by laches. The reorganization agreement is dated *December 20, 1887;* the *decree* of foreclosure and *sale* was entered May 4, *1888;* the *sale* was held September 8, *1888;* and the *stock* in the *new* company was delivered to the Southern Pacific on February 10, *1891. This suit was* not begun until July 26, *1913;* and *not until that time* was there a *proper attempt* to *assert* the specific *equity here enforced;* namely, that the Southern Pacific received the stock in the new Houston Company as trustee for the stockholders of the old. More than *twenty-two years* had thus elapsed since the wrong complained of was committed. But the essence of laches is not merely lapse of time. *It is essential that there be also acquiescence in the alleged wrong, or lack of diligence in seeking a remedy.* Here plaintiffs, or others representing them, protested as soon as

the terms of the reorganization agreements were announced; and ever since, they have with rare pertinacity, and undaunted by failure, persisted in the *diligent pursuit of a remedy,* as the schedule of the earlier litigation referred to in the margin demonstrates. Where the cause of action is of such a nature that a suit to enforce it would be brought on behalf not only of the plaintiff, but of all persons similarly situated, it is not essential that each such person should intervene in the suit brought in order that he be deemed thereafter free from the laches which bars those who sleep on their rights. *Cox* vs. *Stokes,* 156 N. Y. 491, 511, 51 N. E. 316. *Nor does failure, long continued, to discover the appropriate remedy, though well known, establish* laches *where* there has been *due diligence* and, as the lower courts have here found, the defendant was not prejudiced by the delay."

* * * * *

"Because of such wide divergence the earlier decrees do not operate as *res judicata. And there is no basis for the claim of estoppel by election;* nor any reason why the minority, who failed in the attempt to recover on one theory, because unsupported by the facts, should not be permitted to recover on another for which the facts afford ample basis. *William W. Bierce* vs. *Hutchins,* 205 U. S. 340, 347, 51 L. Ed. 828, 833, 27 Sup. Ct. Rep. 524."

* * * * *

"Third. The Southern Pacific challenges the claim for relief on the ground that it took the new Houston Company stock, not as majority stockholder, but as underwriter or banker under the reorganization agreement. The essential facts are these: While dominating the old company through control of a majority of its stock, the Southern Pacific entered into its reorganization, under an agreement by which the minority stockholders of the old company could obtain stock in the new only upon payment in cash of a prohibitive assessment of $71.40 per share (said to be required to satisfy the floating debt and reorganization expenses and charges), while the Southern Pacific was enabled to acquire all the stock in the new company upon paying an assessment of $26 per share (said to be the amount required to satisfy reorganization expenses and charges). The Southern Pacific asserts that, unlike the minority stockholders, it assumed an underwriter's obligation to take the new company's stock not subscribed for by the minority, and also guaranteed part of the principal

and all of the interest on the new company's bonds which were given in exchange for those of the old company. But the purpose of the Southern Pacific in assuming these obligations was in no sense to perform the function of banker. It was to secure the incorporation of the Houston Railroad into its own transcontinental system. *And it was never called upon to pay anything under its guaranty.*"

See other quotations from this case under Point 25.

In *Hanchett* vs. *Blair,* 100 Fed. 817 (C. C. A. 9), at 827, the Court said: "The reasoning upon the question of limitations may be said to apply to the defense of staleness of complainant's cause of action,—not with regard to the period of time elapsing, but to the equitable considerations involved. It has been repeatedly stated by the Federal authorities that: 'Laches does not, like limitation, grow out of the mere passing of time. It is founded upon the inequity of permitting the claim to be enforced,—an inequity founded upon some change in the condition or relations of the property or parties.' *Galliher* vs. *Cadwell,* 145 U. S. 368, 12 Sup. Ct. 873, 36 L. Ed. 738. 'The length of time during which a party neglects the assertion of his rights, which must pass in order to show laches, varies with the peculiar circumstances of each case, and is not, like the matter of limitations, subject to an arbitrary rule. It is an equitable defense, controlled by equitable considerations; and the lapse of time must be so great, and the relations of the defendant to these rights such, that it would be inequitable to permit the plaintiff now to assert them.' *Alsop* vs. *Riker,* 155 U. S. 461, 15 Sup. Ct. 167, 39 L. Ed. 223."

"This inequity has been often held to arise from changed value of property during the time elapsing from the date of the transactions which are the subject of the suit, or from the changed relations of the parties to the property,—as when a sale has taken place, and new rights have arisen. *Hubbard* vs. *Trust Co.,* 30 C. C. A. 520, 528, 87 Fed. 51; *Bartlett* vs. *Ambrose,* 24 C. C. A. 397, 399, 78 Fed. 839. The *present case* is *not one* of the class *where* the *value* of the *property has risen greatly,* or even perceptibly, *while the complainant remained in repose; nor is it one where new rights have arisen,* as it has not been proven that a sale has taken place to the defendant Hanchett. Each case of laches depends upon its own circumstances, and in the case at bar the *complainant's inaction does not appear to have worked injury to anyone; nor is*

it shown that there was any occasion for more promptly asserting his rights."

In *Saxlehner* vs. *Siegel-Cooper Co.,* 179 U. S. 19, at 39, 40, 45 L. Ed. 60 at 76, the court held and said: "But in cases of actual fraud, as we have repeatedly held, notably in the recent case of *McIntire* vs. *Pryor,* 173 U. S. 38, 43 L. Ed. 606, 19 Sup. Ct. Rep. 352, the principle of laches has but an imperfect application, and delay even greater than that permitted by the statute of limitations is not fatal to plaintiff's claim. We have only to refer to the cases analyzed in that opinion for this distinguishing principle that, where actual fraud is proved the court will look with much indulgence upon the circumstances tending to excuse the plaintiff from a prompt assertion of his rights. Indeed, in a case of an active and continuing fraud like this, *we should be satisfied with no evidence of laches that did not amount to proof of assent or acquiescence."*

* * *

"So far as the act is in progress and lies in the future, the right to the intervention of equity is not generally lost by previous delay, in respect to which the elements of an estoppel could rarely arise."

POINT 4.

The Government is estopped to assert laches as the Attorney General violated the mandate of said Act requiring him to present, prosecute and obtain findings of facts and determination by the Courts of the disputes and questions enumerated in Section 5 of said Act.

This Point is considered in connection with assignment of error XX as follows:

The court erred in holding that the United States was not estopped to object to or oppose the answer and cross-bill and the motion to amend same, or the intervening petition, or to move to strike or dismiss either because the Attorney General failed to put in issue or prosecute to determination the validity of the two foreclosures of the mortgages and the disputes set out in the last clause of Section 5 in the Act of June 25, 1929 (46 Stats. 41).

The reasons and decisions set out under Points 1, 2 and 3 above would seem to be all that is necessary to be said in support of this point and assignment.

The Decision in *Southern Pacific* vs. *Bogert* under Point 3 above removed all questions of laches, multifariousness and other remedial matters. (See further quotations and Point 25, p. 139.)

The decision in *U. S.* vs. *Union Pacific* under Point 1, above fully sustains this Point under the facts alleged, and, as not denied are admitted. (See further quotation in Appendix, p. 65.)

After the passage of the act and before the suit, the appellants, their associates and attorneys were conferring with and assisting and furnishing information to the Government attorneys and continued to do so after the institution of the suit.

On November 2, 1931, at the request of the Government attorneys, one of the minority stockholders, Charles Fearon, executed for the Government an affidavit which was filed in this suit and likewise another affidavit on January 28, 1932, and on April 21, 1932. Fearon was called and used as a witness, both by the Government and the railway Co. before the Special Master, testifying as to the Northern Pacific Railroad Company as reorganized in 1875, the stock of said corporation, the stock owned by the witness and others, as to whether or not any threats had been made against the railroad.

During all this period and at this time and until shortly before or after Mr. McGowan withdrew as attorney for the Government, the appellants, their associates and attorneys were led to believe that all rights of the minority stockholders and of the railroad company and all the matters before the Joint Congressional Investigating Committee, including the validity and foreclosure of the mortgages, would be heard and determined in this suit.

POINT 5.

The railway company and other appellees are estopped by delaying their motions and joinder of issue in this cause for 5½ years, and 8 years after the suit was filed agreeing to amendment of the bill.

POINT 6.

Referring the pleadings to a Master before the sufficiency of the Bill is determined by the Court is reversible error.

These two points 5 and 6 will be considered in connection with assignment of error I (R., 1217) and XXIII (R., 1230) which are as follows:

I.

The Court erred in the Decree of May 24, 1932, by referring this cause on a Motion of the Railway Company and others (to which Motion the Railroad Company was not a party, though the Decree by mistake states it was on the Motion of the Northern Pacific Railroad Company) to the Special Master on the pleas, motions to dismiss and other pleadings as such reference was in violation of equity rule 59 as construed by *In re* Parker 283 Fed. 404 at 408, (4) III. (C. C. A.-7), which reversed and cancelled such a reference; *In re* King, 179 Fed. 694 (C. C. A.-7), and *In re* Bartleson Co., 243 Fed. 1001 (D. C. F. la.), and as this decree was sustained by the decrees of October 3, 1935, as amended by the Decree of January 29, 1936, affirming the report of the Special Master under the decree of May 24, 1932, the court again erred (958).

XXIII.

The Court erred in holding that it is now too late for the answer and Cross-Bill and Intervening Petition to be filed in this cause, notwithstanding it took the court, and parties, five years, six months and twenty-eight days from July 31, 1930, to January 29, 1936, to settle the pleadings, at a cost considerably in excess of $25,000.00, on January 29th, 1936, and until that time the minority stockholders (967) did not definitely know, and could not know, that the Attorney General, in dereliction of his duty, and the Mandate of Congress to him and the court, would ignore the mandatory direction of the Court requiring him to have all rights of the Northern Pacific Railroad Company and

Northern Pacific Railway Company to the land, land grants and properties, and the validity of the foreclosure of the mortgages in 1875 and 1896 determined, and further, notwithstanding that the Northern Pacific Railway Company is now in this suit trying to illegally and unlawfully grab, take, seize and possess further and other lands, or their value of the Northern Pacific Railroad Company, while the Northern Pacific Railway Company holds the Northern Pacific Railroad Company in captivity.

Assignment of Error XXI will be considered with this Point (See Appendix, p. 79 and R., 1228).

That Intervention herein is timely, under *Chicago, M. & St. P.* vs. *U. S.*, 159 U. S. 372; 40 L. Ed. 185, where the Milwaukee Company filed its cross bill and the Court said: "Such a cross bill was filed before the entry in the court below of a final decree on the original bill, and the cause was left undetermined as to the claims asserted by the Milwaukee company in its cross bill.

Benjamin Olson, Peter Anderson, and others, parties defendant in the original suit, intervened, with leave of the court, as defendants, and, by a cross bill against the Milwaukee company and the Sioux City company, asserted rights to portions of the lands in controversy—having settled, they alleged, on such lands, under the law of the United States, between the years 1881 and 1887, and made valuable improvements thereon.

The United States answered the cross bill of the Milwaukee company, and also filed an amended bill, in which it prayed that, by final decree, its title to the lands awarded to it by the original decree as against the Sioux City company, be established and quieted as against the Milwaukee company."

The Railway Company by seeking and obtaining the illegal reference in 1932 has entailed on the properties which belong to the Railroad Company a charge of $25,000. for Master's fee and other costs.

When the properties are delivered to the Railroad Company by this Court it will pay its share of proper fees and costs for the Master and for other purposes but costs of the first reference are not proper and cannot justly be assessed against the Railroad Company.

After the passage of the act and before the suit, the appellants, their associates and attorneys were conferring with and assisting and furnishing information to the Government attorneys and continued to do so after the institution of the suit.

On November 2, 1931, at the request of the Government attorneys, one of the minority stockholders, Charles Fearon, executed for the Government an affidavit which was filed in this suit and likewise another affidavit on January 28, 1932, and on April 21, 1932, Fearon was called and used as a witness, both by the Government and the Railway Co. before the Special Master, testifying as to the Northern Pacific Railroad Company as reorganized in 1875, the stock of said corporation, the stock owned by the witness and others, as to whether or not any threats had been made against the railroad.

During all this period and at this time and until shortly before or after Mr. McGowan withdrew as attorney for the Government, the appellants, their associates and attorneys were led to believe that all rights of the minority stockholders and of the railroad company and all the matters before the Joint Congressional Investigating Committee, including the validity and foreclosure of the mortgages, would be heard and determined in this suit.

This estops everyone from asserting that the cross bill or Intervening Petition should have been filed earlier or is too late now.

On April 11, 1938, appellants' counsel made formal demand on the Attorney General to rectify the Bill and Amended Bill of Complaint to comply with the mandate of the suit (R., 1260).

On April 16, 1938, the Attorney General replied to the demand, and without hinting or suggesting that we were too late with the Cross-bill and Answer and Intervening Petition, or with the demand that the bill be rectified, he stated that he thought that the bill complied with the Act of June 25, 1929 (R., 1262).

Certainly the Attorney General after such statement

that the bill does put in issue all the matters and controversies required by the Act, cannot now object to the Court determining such issues and controversies and making findings of fact thereon and determinations thereof, for if they were put in issue in the bill they have been there all the time since the bill was filed eight years ago.

On August 1, 1938, the Government filed an amendment to this Amended Bill (R., 1251) and still assumed that the Railway Company was the owner of the properties which amendment these appellants and also the Northern Pacific Railroad Company by Schmidt and others minority stockholders moved to strike out and the Northern Pacific Railroad Company by Schmidt and others minority stockholders also filed an Answer and Cross-bill to the said amendment and amended bill, and a motion to dismiss the amended bill with the amendment and reserving the motion to strike out (R., 1240).

ASSIGNMENT OF ERROR I.

"The Court Erred in Denying Leave to File the Intervening Petition of These Petitioners Filed on January 31, 1938, as the Said Petition Stated a Good Cause of Action is Timely and Sought Relief and Prevention of Delivery to the Northern Pacific Railway Company, of Lands or Other Value, Which the Said Northern Pacific Railroad Company Had Not Taken Possession of, But Which it is Seeking in This Suit" (R., 1234).

With this Assignment of Error I there will be considered the assignments of error X and XI found in Appendix (pp. 73, 74), which were field by the Northern Pacific Railroad Co., by Schmidt, &c., Minority stockholders, and are appropriate when considering its pending application for appeal found in Appendix (pp. 16 to 38).

In *Pearsall* vs. *Great Northern,* 161 U. S. 846; 40 L. Ed. 383, a suit was sustained and relief granted where the suit was brought by one stockholder for himself and other

stockholders against the Corporation to cancel rights under an illegal contract that had been *actually* signed and was *ultra vires;* neither the United States or the State of Minnesota.

Washington vs. *U. S.,* 87 F. (2d) 421 at 431-4, (C. C. A.—9), which is quoted and discussed with other cases in Modified Reply Brief in Appendix (p. 16), is a strong leading case and seems conclusive of appellants' right to intervene. This case was followed and approved in *Carroll* vs. *N. Y. Life Ins. Co.,* 94 F. (2d) 333 (C. C. A.—8).

Becker-Brooks Co. vs. *N. P. Ry. Co.,* 21 F. (2d) 4 (C. C. A.—8), sustained suit by minority stockholders brought for the Corporation and the N. P. Ry. Co., these as here was majority stockholders following similar tactics which were overruled.

Leary vs. *U. S.,* 224 U. S. 567; 56 L. Ed. 889 (cited above), granted Intervention after all the evidence had been taken in a suit by the United States; it held Petitioner not guilty of laches, and if, his Petition was not sufficient (but Supreme Court held it good) his request to Amend should have been granted.

In *Carter* vs. *Carter Coal Company,* 298 U. S. 228 at 286; 80 L. Ed. 1160 at 1177, the Court held and said: "The right of stockholders to bring such suits under the circumstances disclosed is settled by the recent decision of this court in *Ashwander* vs. *Tennessee Valley Authority,* 297 U. S. 288, 80 L. Ed. 688, 56 S. Ct. 466 (February 17, 1936, and *requires no further discussion.*"

This case foreclosed the question.

In *Arn* vs. *Bradshaw Oil and Gas Co., et al.,* 93 F. (2d) 728 (C. C. A.—5), a suit by stockholders of a corporation for themselves and other stockholders the court held and said, "we think the suit, brought as it was, for the benefit of the corporation, *must* under the facts pleaded, *be regarded as brought by the corporation* and for the protection of its interests in the property in suit."

In October term 1933, *First National Bank* vs. *Flershem,* a corporation reorganization case, 290 U. S. 509, 78

L. 465, 477, the court used language as follows: "But that decree should have been without prejudice to her right to prosecute *her* claim against the Corporation, the assets in the hands of the receivers and the new company. To this end she should be given leave to *intervene* in the receivership suit and there present her claim for such relief as may appear to be appropriate. As the new corporation became party to the suit when it applied for confirmation of the sale, there is here no obstacle to this procedure. Compare *National Surety Co.* vs. *Coriell,* 289 U. S. 426, 438, 77 L. Ed. 1300, 1307, 53 S. Ct. 678, 88 A. L. R. 1231; *Kneeland* vs. *American Loan & T. Co.,* 136 U. S. 89, 34 L. Ed. 379, 10 S. Ct. 950."

Stockholders for the benefit of the corporation and other stockholders have maintained suits, or been allowed to intervene for such purpose in the following cases: *Farmers' Loan and Trust Company* vs. *N. Y. and N. Ry. Co.,* 44 N. E. 1043, 150 N. Y. 410; *Gamble* vs. *Water Company,* 123 N. Y. 91:25 N. E. 201; *Ponder* vs. *Railroad Co.,* 72 How. 385, 389; 25 N. Y. Supp. 560; *Barr* vs. *Railroad Co.,* 96 N. Y. 444; *Sage* vs. *Culver,* 147 N. Y. 241; 41 N. E. 513 *Meyer* vs. *Ry. Co.,* 7 N. Y. St. Rep. 245; *Ervin* vs. *Navigation Co.,* 27 Fed. 630 (. . . .); *Arn* vs. *Bradshaw Oil and Gas Co.,* 93 F. (2d) 728 (C. C. A.—5); *S. P.* vs. *Bogut,* 250 U. S. 463; 63 L. Ed. 1099; *Bierce* vs. *Hutchins,* 205 U. S. 340, 347; 51 L. Ed. 828, 833. An applicable class suit to enforce a Trust is *Thompson* vs. *Deal,* 67 Apps. D. C., 327: 92 F. (2d) 478, quoted under Point 25 citing and quoting from *U. S.* vs. *Butler,* 297 U. S. 1: 80 L. Ed. 477.

In *United States* vs. *California Co-operative Canneries,* 279 U. S. at 556; 73 L. Ed. 841, the Court held and said: "It did not refer to the decisions which hold that an order denying leave to intervene is not appealable, (citations) except where he who seeks to intervene has a direct and immediate interest in a *res* which is the subject of the suit, (Compare *French* vs. *Copen,* 105 U. S. 509, 524-526, 26 L. Ed. 956, 957; *Smith* vs. *Gale,* 144 U. S. 509, 36 L. Ed. 521, 12 Sup. Ct. Rep. 614; *Leary* vs. *United States,* 224 U. S. 567, 56 L. Ed. 889, 32 Sup. Ct. Rep. 599; *Swift* vs. *Black Panther Oil & Gas Co.,* 156 C. C. A. 448, 244 Fed. 20, 30.)"

In *Credits Commutation Co.* vs. *United States,* 177 U. S. at 315, 44 L. Ed. at 785, the Court stated and held: "It is doubtless true that cases may arise where the denial of a right of a third party to intervene therein would be a practical denial of certain relief to which the intervener is fairly entitled, and which he can only obtain by interventions."

This case was cited and approved in the following cases: *Illinois Steel Co.* vs. *Ramsey,* 176 Fed. 853 at 863, 100 C. C. A.—8 323, and *Western Union Telegraph Co.* vs. *United States and Mexican Trust Co.,* 221 Fed. 552, 137 C. C. A.—8 113, both holding claimant of lien on specific property in exclusive control of court has right to intervent and denial of petition therefor is reviewable; *Central Trust Co.* vs. *Chicago, etc., R. Co.,* 218 Fed. 336 at 339, 134 C. C. A.—2, 144, orders denying entervention of non-depositing bondholders in proceedings to foreclose mortgage on railway stock, which disposed of petitioner's claims, are final and appealable. In the instant case the non-depositing minority stockholders are attacking same after sale and under a special statute giving such authority, appellants having alleged and shown by exhibits that the sale was void and there was only an exchange of stock.

United States vs. *Northwestern Development Co.,* 203 Fed. 960 at 962, 122 C. C. A.—9 262, where petition in intervention was dismissed in final judgment in an action at law as not stating cause of action, judgment was reviewable on writ of error; *United States Trust Co.* vs. *Chicago, etc., R. Co.,* 188 Fed. 292 at 296, 110 C. C. A.—7 270, order denying petition to intervene where intervention was matter of right, held reviewable. This case cites *Minot* vs. *Martin,* 95 Fed. 734 (C. C. A.—8.)

POINT 7.

The Northern Pacific Railroad Company was prohibited by the Act of July 2, 1864, from issuing any mortgage or bonds and the Joint Resolution of May 31, 1870, was not a grant but only an exception to the prohibition, and this exception restricted the railroad company to the issuance and execution of one mortgage

and bonds thereunder, and such mortgage could not be a lien on the roadbed or right of way.

Assignment of Error III, IX, XVI, will be considered under this Point and as in Appendix, pp. 71, 73, 76.

The Act provides:

Section 10: "* * * and no mortgage or construction bonds shall ever be issued by said company on said road, or mortgage, or lien made in any way, except by the consent of the Congress of the United States."

The joint resolution provides: "* * * authorized to issue its bonds to aid in the construction and equipment of its road, and to secure the same by mortgage on its property and right of property of all kinds and descriptions, real, personal, and mixed, including its franchises as a corporation; and, as proof and notice of its legal execution and effectual delivery, said mortgage shall be filed and recorded in the office of the Secretary of the Interior".

This requirement of recording the mortgage in the Interior Department indicates that it was restricted to the land which could be resold and of which the Interior Department had supervision and control and did not include the right of way and roadbed of which the Interior Department had no supervision or control.

There was no requirement for the recording of the mortgage among the land records of the various counties and states tranversed by the railroad company; Congress and the railroad officials both construed the Act as not including the right of way and roadbed under the lien of the mortgage as Congress did not require recordation in the counties and states as public notice thereof and the railroad officials and attorneys did not record the mortgage in any of the counties or states.

There was *no* provision to *repeal* the Joint Resolution —only to *alter* or *amend*—by Section 2.

The Joint Resolution was not an amendment of the Act of July 2, 1864, and the prohibition in Section 10 of the Act against mortgages was not amended or changed but Congress *authorized* and consented to the *one mortgage*

on its *"property"*, etc., by the Joint Resolution as provided for in the last clause of the prohibition but this mortgage could not cover the *"road"*.

The Act of Congress of July 2, 1864, and the Joint Resolution of May 31, 1870, not only did not give authority to sell but in terms and effect prohibited any sale of the lands and property of the railroad company in foreclosure under the one and only mortgage permitted by the act and resolution, except the lands beyond the right of way, which the act specifically provided for the sale of; this prohibition was for the purpose of preventing the right of way and the properties thereon, with necessary assets and franchises for the operation of same, from passing beyond the control of Congress by the right to amend and thus securing to the United States perpetually an ability to enforce its right for the transportation of the mail and troops and other privileges reserved to the United States under the Act of July 2, 1864, and the Joint Resolution of May 31, 1870; in *Northern Pacific Railway Co.* vs. *Townsend,* 190 U. S. 267; 47 L. Ed. 1044, the Court held that the right of way of the Northern Pacific Railroad Company could not be sold and conveyed by the railroad company, and in *California* vs. *Central Pacific Railroad Company and others,* 127 U. S. 1; 32 L. Ed. 150, the Supreme Court held that a state could not tax a franchise of different railroad companies granted by Congress without the consent of Congress, and the Court found as a fact and stated, "That to facilitate the construction of said road the Government of the United States by said act of Congress adopted the defendant as the instrument or agent of the United States."

Section 10 of the Act of July 2, 1864, incorporating the railroad company provides "and (*a*) *no mortgage* or construction bond shall ever be issued by the said company *on said road* or (*b*) mortgage or lien made in any way except by the consent of the Congress of the United States. (*a* and *b* inserted.)

The (a) clause of Section 10 of the Act of 1864 was an absolute prohibition against a lien or mortgage on its

"*road*" which clearly means its right of way, roads, depots, &c., and the Joint Resolution was not an amendment of that clause nor did it refer to it or relieve from the prohibition thereof, for it was only the consent and authority of Congress under the (b) clause for a lien or mortgage on the land and rights of land.

The Joint Resolution uses words in the singular and it is not necessary to apply them to things in the plural to carry out the intent of the statute as the clear intent of the statute was only to provide for one mortgage sufficient to aid in the construction and equipment of the road as it was then figured $50,000. per mile for 2,500 miles or $125,000,000 which was the actual cost of construction on completion (*First National Bank* vs. *Missouri,* 263 U. S. 640; 68 L. Ed. 486).

The extent of the power of the railroad company is to be measured by the terms of the Federal statute relating to the railroad company and they can rightfully exercise only such as are expressly granted or such incidental powers as are necessary to carry on the business which they establish, but an incidental power can avail neither to creat powers which expressly or by reasonable implication are withheld nor to enlarge powers given but only to carry into effect those powers which are granted (*First National Bank* vs. *Missouri*).

"That the enumeration of these powers implies the exclusion of *all others*" *Pullman Co.* vs. *C. T. Co.,* 139 U. S. 24, 35 L. Ed. at 68 (quoted further under Point 10).

In *First National Bank* vs. *Missouri,* 263 U. S. 640; 68 L. Ed. 486, the Court said: "Does it conflict with the laws of the United States? In our opinion, it does not. *The extent of the powers* of national banks is to be *measured by the terms of the Federal statutes* relating to such associations, and they can *rightfully exercise only* such as are *expressly granted, or such incidental powers* as are *necessary to carry on the business* for which they are *established. Bullard* vs. *National Eagle Bank,* 18 Wall. 589, 593, 21 L. Ed. 923, 925; *Logan County Bank* vs. *Townsend,* 139 U. S. 67, 73, 35 L. Ed. 107, 110, 11 Sup. Ct. Rep. 496; *California Nat. Bank* vs. *Kennedy,* 167 U. S. 362, 366, 42 L. Ed. 198,

200, 17 Sup. Ct. Rep. 831. Among other things the Federal law (Rev. Stat. sec. 5154, Comp. Stat. Sec. 9694, 6 Fed. Stat. Anno. 2d Ed. p. 713), provides that the organization certificate of the association shall specifically state "the place where its operations of discount and deposit are to be carried on, designating the state, territory or district and the particular county, city, town or village." By another provision (Rev. Stat. sec. 5190, Comp. Stat. sec. 9744, 6 Fed. Stat. 2d Ed. p. 740), it is required that "the *usual business* of each national banking association *shall be transacted at an office or banking house located in the place specified* in its organization certificate." *Strictly,* the latter provision employing, as it does, the *article "an"* to *qualify words* in the *singular number,* would confine the association to one office or banking house. We are asked, however, to construe it otherwise in view of the rule that *"words importing the singular number may extend and be applied to several persons or things."* Rev. Stat. sec. 1, Comp. Stat. sec. 1, 9 Fed. Stat. Anno. 2d Ed. page 388. *But, obviously, this rule is not one to be applied except where it is necessary to carry out the evident intent of the statute.* See *Garrigus* vs. *Parke County,* 39 Ind. 66, 70: *Moynahan* vs. *New York,* 205 N. Y. 181, 186, 98 N. E. 842.

* * * * * *

But it is said that the establishment of a branch bank is the exercise of an incidental power conferred by sec. 5136, Rev. Stat. (Comp. Stat. sec. 9661, 6 Fed. Stat. Anno. 2d Ed. p. 654), by which the national banking associations are vested with *"all such incidental power as shall be necessary* to carry on the business of banking." The *mere multiplication* of places where the powers of a bank may be exercised is *not,* in our opinion, a *necessary incident* of a banking business, within the meaning of this provision. Moreover, the reasons adduced against the existence of the power substantively are *conclusive against its existence* incidentally; for it is wholly illogical to say that a power which, by fair construction of the statutes, is found to be denied, nevertheless exists as an incidental power. *Certainly, an incidental power can avail neither to create powers which,* expressly or *by reasonable implication, are withheld, nor to enlarge powers given;* but only to carry into effect those which are granted."

When the mortgage of July 1, 1870, under the above Joint Resolution was executed, experts made estimates for

the railroad and for Congress and the mortgage so executed was sufficient to construct and complete the railroad as planned, and as it was constructed and completed, and there was no intention or expectation of another mortgage being necessary or desirable. The Act and the Joint Resolution clearly limit the power of the railroad to one mortgage but where a statute making a grant of property or powers or franchises to a private individual or private corporation becomes the subject of construction as regards the extent of the grant, the universal rule is that in doubtful points the construction shall be against the grantee and in favor of the Government or the general public. *Oregon R. & N. Co.* vs. *Oregonian Ry. Co.,* 130 U. S. 1, 26; 32 L. Ed. 837, 842; *Charles River Bridge* vs. *Warren Bridge,* 11 Pet. 420; 9 L. Ed. 773.

The words "successors and assigns" in Sections 2 and 3 of the Act of 1862 and omitted in Section 7 and other sections and not put in the Joint Resolution of May 31, 1870, are surplusage and do not carry the power to sell or assign or have a foreclosure of the mortgage, certainly without the consent of the United States.

In *Oregon Railway & Navigation Company* vs. *Oregonian Railway Company,* 130 U. S. 1; 32 L. Ed. 837, the Court stated: "It is strenuously argued, and with some degree of plausibility that the language of this proviso and the use of the words '*successors*' and '*assigns*' in other statutes, which are refered to imply that by the law of Oregon railroad companies may make, and must be supposed to be capable of making, assignments. But whatever may have been the intent in the minds of the legislators in using these words, *it is not precisely the form in which we would expect to find a grant of the power to sell,* to *lease,* or to *transfer* the title, ownership, or *use of railroad* lines, the property belonging thereto, and the franchises necessary to carry them on, by one corporation to another.

One of the *most important powers* with which a corporation can be invested is the *right to sell out its whole property,* together with the franchises under which it is operated, or the authority to *lease* its property for a long term of years. In the case of a railroad company *these privileges, next* to the *right to build* and operate its rail-

road, would be the *most important which could be given it,* and this idea would impress itself upon the Legislature. Naturally, we would look for the authority to do these things in some express provision of law. We would suppose that if the Legislature saw fit to confer such rights *it would do so in terms which could not be misunderstood.* To infer, on the contrary that it either intended to confer them or to recognize that they already existed, by the simple use of the word *'assigns', a very loose and indefinite term,* is a stretch of the power of the court in making implication which we do not feel to be justified."

(See further quotation under Point 10.)

The execution of the mortgage of July 1, 1870, under the facts alleged and the public record, exhausted the grant under the Joint Resolution for when a charter power (to mortgage) is once exhausted it is in respect to further contracts and rights as though it had never been granted and there could be no further mortgage under that Joint Resolution.

In *E. T. V. & G. Ry. Co.* vs. *Frozier,* 139 U. S. 288; 35 L. Ed. 196, the Court: "Whatever special right of mortgage were given by the Act of 1847 were exhausted. That special right was to increase its capital by the issue of bonds secured by mortgage to a sum sufficient to complete its road, and stock it with everything to give it full operation. It appears that the road authorized by this charter was completed, equipped and in full operation more than twenty-five years before the mortgage of 1881 and long before the consolidation of 1869. *Of course when a charter power is once exhausted it is in respect* to further contracts and rights, as *though it had never been granted.* So, in, 1881, when the railroad company executed its mortgage, it was not by virtue of this special grant of power, but by virtue of the general power given by subsequent statutes and the exercise of such general power must be held subordinate to the terms accompanying its grant."

In 1896 the officials of the railway company, practically all of whom were also officials of the railroad company, and the Reorganization *Managers,* were so *doubtful* that they could maintain that more than one mortgage was authorized and valid and that any and all of the mortgages in the foreclosure suits were valid, as the Joint Reso-

lution used the words "the mortgage" twice, "said mortgage" once and "such mortgage" once, that they *used every effort to prevent the Federal Court in Wisconsin from deciding this* question that was squarely presented to the Court and continued by decrees without being determined and which never was determined. The jurisdiction of the Court likewise never was determined.

If there is doubt in the construction of the Joint Resolution of 1870, as to the extent of the power to mortgage so granted such doubt must be resolved against the railroad company and in favor of the Government and public, whether or not the Joint Resolution permitted a mortgage on the right of way granted by Section 2 of the Act of July 2, 1864.

The facts and law determined by the Supreme Court in *Northern Pacific Railway Co.* vs. *Townsend,* 190 U. S. 267; 47 L. Ed. 1044, also resolved any doubt that might arise against the grant as authorizing a mortgage on the *right of way* of the railroad company by finding and stating: "Following decisions of this court construing grants of rights of way similar in tenor to the grant now being considered (*New Mexico* vs. *United States Trust Co.,* 172 U. S. 171, 181, 43 L. Ed. 407, 410, 19 Sup. Ct. Rep. 128; *St. Joseph & Denver C. R. Co.* vs. *Baldwin,* 103 U. S. 426; 26 L. Ed. 578), *it must be held that the fee passed by the grant made in Section 2 of the act of July 2, 1864.* But although there was a present grant, it was yet subject to conditions expressly stated in the act, and also (to quote the language of the Baldwin Case) 'To those necessarily implied, such as that the road shall be * * * used for the purposes designed'. Manifestly, the land forming the right of way was not granted with the intent that it might be *absolutely disposed of* at the *volition of the company.* On the contrary, the grant was explicitly stated to be for a designated purpose,—one which negated the *existence of the power to voluntarily alienate the right of way or any portion thereof.* The substantial consideration inducing the grant was the perpetual use of the land for the legitimate purposes of the railroad, just as though the land had been conveyed in terms to have and to hold the same so long as it was used for the railroad right of way. In effect the grant was of a *limited fee, made on an implied condi-*

tion of reverter in the event that the company ceased to use or *retain the land* for the purpose for which it was granted."

* * * * *

"To repeat, the right of way was given in order that the obligations to the United States, assumed in the acceptance of the act, might be performed. Congress having plainly manifested its intention that the title to, and possession of, the right of way should continue in the original grantee, its successors and assigns, so long as the railroad was maintained, the possession by individuals of portions of the right of way cannot be treated without overthrowing the act of Congress, as forming the basis of an adverse possession which may ripen into a title good as against the railroad company."

In *U. S.* vs. *Stanford*, 161 U. S. at 416, 40 L. Ed. 754, the Court said the Act of July 1, 1862, provided "to secure the repayment to the United States, as hereinafter provided, of the amount said bonds so issued and delivered to said company, together with all interest thereon which shall have been paid by the United States, the issue of said bonds and delivery to the company shall *ipso facto constitute a mortgage on* the *whole line* of the *railroad* and *telegraph, together with* the *rolling stock, fixtures,* and *property* of *every kind and description,* and in consideration of which said bonds may be issued; and on the refusal or failure of said company to redeem said bonds, or any part of them, when required so to do by the Secretary of the Treasury, in accordance with the provisions of this act, the *said road,* with all the rights, functions, immunities, and appurtenances thereunto belonging, and also all lands granted to the said company by the United States, which, at the time of said default shall remain in the ownership of said company, may be taken possession of by the Secretary of the Treasury for the use and benefit of the United States".

While the Northern Pacific Act does not name *right of way,* etc., in clause authorizing the mortgage.

In *Kindred* vs. *Union Pacific Railroad Co.,* 225 U. S. 582, 56 L. Ed. 1216, the Court said: At an early stage of the case it appears to have been contended that the appellants acquired title to parts of the right of way by adverse possession; but as the contention is expressly abandoned in the brief, evidently in view of the ruling in *Northern P. R. Co.* vs. *Smith,* 171 U. S. 260, 43 L. Ed. 157,

18 Sup. Ct. Rep. 794; *Northern P. R. Co.* vs. *Townsend,* 190 U. S. 267, 47 L. Ed. 1044, 23 Sup. Ct. Rep. 671; and *Northern P. R. Co.* vs. *Ely,* 197 U. S. 1, 49 L. Ed. 639, 25 Sup. Ct. Rep. 302, it need not be considered.

In *St. Jo. and Denver City R. R. Co.* vs. *Baldwin,* 103 U. S. 426 at 429, 26 L. Ed. 578 at 579, which was quoted in Townsend case above, the Court, after stating one section, granted the right of way and other sections aid lands with lieu lands, said: "But the grant of the right of way, by the 6th section, contains no reservations or exceptions. It is a present absolute grant, subject to no conditions except those necessarily implied, such as that the road shall be constructed and used for the purposes designed. Nor is there anything in the policy of the government with respect to the public lands which would call for any qualification of the terms. Those lands would not be the less valuable for settlement by a road running through them. On the contrary, their value would be greatly enhanced thereby.

"The right of way for the whole distance of the proposed route, was a very important part of the aid given. If the Company could be compelled to purchase its way over any section that might be occupied in advance of its location, very serious obstacles would be often imposed to the progress of the road. For any loss of lands by settlement or reservation, other lands are given, but for the loss of the right of way by these means, no compensation is provided, nor could any be given by the substitution of another route.

"The uncertainty as to the ultimate location of the line of the road is recognized throughout the Act, and where any qualification is intended in the operation of the grant of lands, from this circumstance, it is designated. Had a similar qualification upon the absolute grant of the right of way been intended, it can hardly be doubted that it would have been expressed. The fact that none is expressed, is conclusive that none exists.

"We see no reason, therefore, for not giving to the words of present grant, with respect to the right of way, the same construction which we should be compelled to give, according to our repeated decisions, to the grant of lands had no limitation been expressed."

In *Memphis R. R. Co.* vs. *Berry,* 112 U. S. 609, 28 L. 837, the Court said: "It was in April, 1877, that the

plaintiff in error was organized as a Corporation, deriving its authority for that purpose, as it claims, under the special Act of January 11, 1853, but without power to do so, as is claimed on behalf of the defendant in error, except as enabled by the Act of December 9, 1874.

The case of the plaintiff in error rests entirely upon the words of the 9th section of the Act of incorporation of the Memphis and Little Rock Railroad Company of January 11, 1853, by which it was empowered to borrow money 'on the credit of the Company and on the mortgage of its charter and works'."

And the Court held that the franchise to be a corporation could not be mortgaged or sold.

This was followed in *N. O. D. Co.* vs. *La.,* 180 U. S. 329; 45 L. Ed. 556.

POINT 8.

No suit could be prosecuted for foreclosure of the mortgage authorized by the joint resolution of 1870 unless the United States was made a party thereto and the United States never gave any authority for the so-called foreclosure suits in 1875 and 1896 and the Government never consented to be or be made a party to either of said suits.

This Point will be considered with Assignment of Error III (R., 1218, Appendix, p. 71).

Congress refused to recognize any title in the land in the Northern Pacific Railway Company as is shown by the Act of July 1, 1898, as Congress knew that the United States was a necessary party to any suit to foreclose the mortgage under the Joint Resolution. Appellants and associates helped obtain the passage of this Act.

This was before the Hoover suit was filed in 1900 and Congress was not inclined to take action then to settle the dispute and purposely left the question open.

In 1929 Congress knew of the then status of the Hoover suit and as it was then shown from the actual suit pending that the question of title could not be contested or settled unless the United States was a party to the suit for such determination of the disputes, therefore, Con-

gress passed the Act of June 25, 1929, authorizing this suit in its own name, requiring a finding of fact and determination of all disputes named in Section 5 of the Act, and thereby consenting for the United States to be a party to litigation to settle the title and various contentions.

This statute is very broad and sweeping in its terms, and requires the putting in issue of various matters which if set up in an ordinary suit would make it multifarious.

It seems clear that this *action* of Congress is *conclusive* that *Congress construed* the *Act* of July 2, 1864, and the Joint Resolution to *require* the *United States* to be made a *party* to *any suit involving* the *mortgage* under the Joint Resolution and any question of title of land grants in the said Act and Joint Resolution.

At the time of the said foreclosure proceedings in 1896 there were large acreages of unsurveyed and unidentified lands which stood in the name of the United States, and yet the so-called foreclosure proceedings stated that such unsurveyed and unidentified lands were being sold, and they contended they passed in good fee simple title based on the said void decrees of sale, notwithstaning the United States which held legal title was not a party to this suit.

It is hard to understand how any intelligent attorney would make such contentions in this court or any other court in view of all of the Federal and State decisions to the contrary.

In the Roberts case above it is stated "It is obvious that the effect of this legislation of Congress was to grant the power to construct and *maintain* a public highway for the use of the people of the United States, and subject in important respects to the control of Congress".

Under this principle no court could divest Congress of that control unless Congress consented, and the United States became a party to such suit.

In *Ribon* vs. *Chicago, R. I. & Pac. R. R. Co.,* 16 Wall. 446; 21 L. Ed. 367 at 368, the Court said: "The want of parties is the only point we have found it necessary to consider.

The rule in equity as to parties defendant is, *that all whose interests will be affected* by the decree sought to be obtained *must be before the court;* and if any such persons cannot be reached by process (do not voluntarily appear, or from a jurisdictional objection going to the person in the courts of the United States, cannot be made parties) the bill must be dismissed. Where a decree can be made as to those present, without affecting the rights of those who are absent, the court will proceed. But if the interests of those present and of those absent are inseparable, the obstacle is insuperable. The act of Congress of 1839 and the rule of this court upon the subject give no warrant for the idea that parties whose presence was before indispensable could be thereafter be dispensed with. The subject was fully considered in *Shields* vs. *Barrow,* 17 How. 130, 15 L. Ed. 158. What is there said need not be repeated."

In *Bolton* vs. *Ickes,* 67 App. D. C. 112; 89 F. (2d) 856, 65 W. L. R. 847, the Court held and said: "It is the general rule in equity, that in order that a final and complete decree may be made, all persons 'are to be made parties who are legally or beneficially interested in the subject matter and result of the suit'. *Caldwell* vs. *Taggart,* 4 Pet. 190, 202; *Gregory* vs. *Stetson,* 133 U. S. 579, 586."

The Court also held that the *matter is jurisdictional* and the *Court could,* and possibly should, *raise it on the Court's own motion.*

This case cites *Shields* vs. *Barrow,* 17 How. 129, 193; 15 L. Ed. 158, as a leading case.

In *Skeen* vs. *Lynch,* 48 Fed. (2d) 1044, 1045-6 (C. C. A. 10) (*certiorari* denied: 284 U. S. 633), the court said, in holding that where a patent conveying stock-raising lands reserved coal and other minerals, and the patentee sought to quiet title to oil and gas as against the government's prospecting permittees, the United States was an indispensable party: "As to the first cause of action, the court is of the opinion that the United States is an indispensable party. The plaintiff asserts title to the oil and gas under the said 640 acres. The United States in its patent conveying the lands to appellant excepted and reserved to itself 'all the coal and other minerals in the land so entered and patented, together with the right to prospect for, mine, and remove the same * * * . The bill

shows that defendants named claim no interest in the oil and gas other than as permittees and prospective lessees of the United States.

The interest of the United States in the subject matter in litigation is not less obvious and substantial than it was in the case of *Louisiana* vs. *Garfield,* 211 U. S. 70, 29 S. Ct. 31, 53 L. Ed. 92, in which it was held to be an indispensable party. The bill discloses the claim of ownership of the oil and gas made by the United States. * * * A decree for plaintiff on the first count would be a cloud on the title of the United States, and its permittee and prospective lessee would be subject to ouster if she continued to attorn to the United States.

In *New Mexico* vs. *Lane,* 243 U. S. 52, 37 S. Ct. 348, 61 L. Ed. 588, the state claimed title to forty acres under Congressional grant and prayed that it be adjudged the owner. A certificate of purchase of the forty acres of coal land had been issued to one Keepers by the United States. Held, Keepers was an indispensable party.

In *California* vs. *Southern Pacific Co.,* 157 U. S. 229, 15 S. Ct. 591, 599, 39 L. Ed. 683, it was held that 'if the rights of those not before the court are inseparably connected with the claim of the parties litigant, so that a final decision cannot be made between them without affecting the rights of the absent parties', the court cannot proceed with the adjudication in their absence; that 'the familair rule in equity, * * * is the doing of complete justice by deciding upon and settling the rights of all persons materially interested in the subject of the suit, to which end such persons should be made parties'. * * * So much for the first count. The motion to dismiss it on the ground that the United States was an indispensable party was well taken.''

Quotations supporting this Point are in the Appendix: *Calif.* vs. *S. P.,* p. 44; *Gregory* vs. *Stetson,* p. 43; *Carroll* vs. *N. Y. Life Ins. Co.,* p. 46; *Eastman, &c., Co.* vs. *U. S.,* p. 47; *Reid* vs. *U. S.,* p. 47; *Choctaw Nation* vs. *U. S.,* p. 47; *Den.* vs. *Hoboken, L. & J. Co.,* p. 49.

In *New Mexico* vs. *Lane,* 243 U. S. 52 at 58; 61 L. Ed. 588 at 591, the court said: ''The motion should be granted on the ground that the suit is one against the United States, under the authority of *Louisiana* vs. *Garfield,* 211 U. S. 70, 53 L. Ed. 92, 29 Sup. Ct. Rep. 31. In that case a bill was brought in this court to establish the title of the state of

Louisiana to certain swamp lands which it claimed under the statutes of the United States and to enjoin the Secretary of the Interior and other officers of the Land Department from carrying out an order making different disposition of the land.

"Under the statute, it was contended, the land vested in the state in fee simple; that is, the act was contended to have the same character and efficacy as the Act of June 21, 1898, is asserted to have in the case at bar. And certain facts were necessary to be determined as elements of decision. This court said that in the case there were questions of law and of fact upon which the United States would have to be heard. So in the present case there is a *question* of *law whether* the *Act* of June 21, 1898, *had the quality as a grant of the land,* asserted of it, whether of itself or because of its terms or their prior construction and its adoption; indeed, whether there was such a prior construction or its adoption; and again, of the fact of the character of the land at the time of the grant, and the evidence of it and the knowledge of it.

"It would seem, besides, that, under the averments of the bill, Keepers is an indispensable party, he having become, according to the bill, a purchaser of the land and paid the purchase price thereof. To make him a party would oust this court of jurisdiction, if he is a citizen of New Mexico, and the presumption expressed by defendants that he is complainant does not deny. *California* vs. *Southern P. Co.,* 157 U. S. 229, 39 L. Ed. 683, 15 Sup. Ct. Rep. 591."

Dismissed.

In an equity case, every indispensable party must be brought into court, or the suit will be dismissed by the court on its own motion. *Chicago, M., St. P. & P. R. Co.* vs. *Adams County,* 72 Fed. (2d) 816, 818 (C. C. A. 9), and numerous cases cited. Following and quoting from *Minnesota* vs. *Northern Securities,* 184 U. S. 199, this Court says: "When all the parties are before the court, the whole case may be seen; but it may not, where all the conflicting interests are not brought out upon the pleadings by the original parties thereto. Story, Eq. Pl., Para. 72.

"The established practice of courts of equity to dismiss the plaintiff's bill if it appears that to grant the relief prayed for would injuriously affect persons materially interested in the subject-matter who are not made parties

to the suit is founded upon clear reasons, and *may be enforced by the court, sua sponte,* though not raised by the pleadings or suggested by the counsel. (Cases cited.)

This case held that where a county was sued to cancel a tax that the County Treasurer was also a necessary party, following *Skagitt County* vs. *N. P. Ry. Co.*, 61 F. (2d) 638 (C. C. A. 9).

This decision with the cases cited are conclusive that the United States was a necessary party to any suit to foreclose any mortgage claimed to have been executed by the Railroad Co.

In *Consolidated Water Co.* vs. *City of San Diego,* 93 Fed. 851 (C. C. A. 9), the Court says: "In *Gregory* vs. *Stetson,* 133 U. S. 579, 586, 10 Sup. Ct. 422, 424, where the circuit court entered a decree dismissing the bill for want of proper parties, Lamar, J., in delivering the opinion of the court, said:

'We are of opinion that the decree of the court below must stand. The rule as to who shall be made parties to a suit in equity is thus stated in Story, Eq. Pl., Sec. 72.' " (See quotation from *Gregory* vs. *Stetson* in Appendix (p. 43).

In *Central Pacific Railroad Company* vs. *Gallatin,* 99 U. S. 727, 25 L. Ed. 504, the court held:

By the Act of Congress of 1862, all the rights, privileges and franchises, including land-grants and subsidy bonds were given to the Central Pac. R. R. Co., that were granted to the Union Pac. R. R. Co., except the franchise of being a Corporation which it already possessed under the laws of California.

That State, by implication at least, has given its assent to what was so done by Congress.

The Act of Congress of 1864, granting to the former Company certain additional corporate powers and pecuniary resources reserved to Congress full power of amendment.

The Central Pacific Co. assigned to the Western Pacific Co., organized under the law of California, its rights under the Act of Congress, to construct the road between San Jose and Sacramento, and this assignment was ratified, and further privileges given it by Congress.

The establishment of a sinking fund by the Act of 1878,

is within the power of Congress and is not at all in conflict with anything contained in the original state charters.

The Court said:

"Under this legislation we are of the opinion that, to the extent of the powers, rights, privileges and immunities granted these corporations by the United States, Congress retain the right of amendment, and that in this way it may regulate the administration of the affairs of the Company in reference to the debts created under its own authority, in a manner not inconsistent with the requirements of the original state charter, as modified by the state Aid Act of 1864, accepting what had been done by Congress."

The Union Pacific case, 99 U. S. 700, 25 L. Ed. 496, decided the same day with this case was exactly the same except that the Union Pacific was chartered by Congress.

California vs. *S. P.,* 39 L. Ed. 683, the Court held that a court cannot adjudicate directly upon a party's right, without the party being actually or constructively before the court.

The Court said: "It was held at an early day that Congress could neither enlarge nor restrict the original jurisdiction of this court (*Marbury* vs. *Madison,* 5 U. S. 1 Cranch, 137, 173, 174 (2: 60, 72), and no attempt to do so is suggested here. The jurisdiction is limited and manifestly intended to be sparingly exercised, and should not be expanded by construction. What Congress may have power to do in relation to the jurisdiction of circuit courts of the United States is not the question, but whether, where the Constitution provides that this court shall have original jurisdiction in cases in which the state is plaintiff and citizens of another state defendants, that jurisdiction can be held to embrace a suit between a state and citizens of another state and of the same state. We are of opinion that our original jurisdiction cannot be thus extended, and that the bill must be dismissed for want of parties who should be joined, but cannot be without ousting the jurisdiction. Bill dismissed."

Extended quotations sustaining this Point are in the Appendix from *Ritchie* vs. *Sayers,* 100 Fed. 521 (D. C. W. Va.), p. 42; *Calif.* v. *S. P.,* p. 44.

POINT 9.

The Northern Pacific Railroad Company was created by the act, and still is, an agency of the United States Government to be used in transportation of mail and troops and for other purposes in behalf of the Government, and neither the State of Wisconsin nor any other state can tax the same and thereby have the power to destroy such railroad and such agency of the Government in the manner that the State of Wisconsin or other states can by taxation destroy the said Northern Pacific Railway Company of Wisconsin or other state created corporations of such state as creates it.

POINT 10.

Under the Act of July 2, 1864, and the acts amendatory thereof, the railroad company was never at any time able, nor had authority, or power, to sell, transfer, convey by deed, lease or other contract its railroad property, assets and lands to any other corporation.

POINT 11.

The State of Wisconsin, under the law and under the decisions of the Supreme Court of the United States, cannot change the Northern Pacific Railroad or any of its property, assets and lands or in any way prejudice or destroy them by any legislation or judicial determinations of the State of Wisconsin or prejudice, injure, depreciate, or destroy the rights of the stockholders of the Northern Pacific Railroad Company.

Points 9, 10 and 11 with assignment of error 13, 16, 17 (see appendix, pp. 75, 76, 77) will be considered together.

Railway attorney Kerr testified that in *L. S. & M. P. R. Co.* vs. *U. S.,* 93 U. S. 442; 23 L. Ed. 965, the railroad company was an agent of the United States.

California vs. *Central Pacific R. Co.,* 127 U. S. 1; 32 L. Ed. 150, held that railroads created by Act of Congress like the Northern Pacific Railroad Company were agents of the Federal Government and could not be taxed by the State.

In *Osborn* vs. *United States Bank,* 9 Wheat. 738, 823, 6 L. Ed. 204, the Court found and determined: "The charter of incorporation not only creates it, but gives it every

faculty which it possesses. The power to acquire rights of any description, to transact business of any description, to make contracts of any description, to sue on those contracts, is given and measured by its charter, and that charter is a law of the United States. This being *can acquire no right, make no contract,* bring no suit, *which is not authorized by a law of the United States.* It is not itself the mere creature of a law, but all its actions and all its rights are dependent on the same law" (R., 1119).

In *Chicago T. & T. Co.* vs. *Forty-one Thirty-six W. Corp.,* 302 U. S. 120, 82 Law 109, 113, the Court held and said: "How long and upon what terms a state-created corporation may continue to exist is a matter exclusively of state power. *Horn Silver Min. Co.* vs. *New York,* 143 U. S. 305, 312, 313, 36 L. Ed. 164, 167, 168, 12 S. Ct. 403, 4 Inters. Com. Rep. 57; *Ashley* vs. *Ryan,* 153 U. S. 436, 441, 443, 38 L. Ed. 773, 776, 778, 14 S. Ct. 820; *New Jersey* vs. *Anderson,* 203 U. S. 483, 493, 51 L. Ed. 284, 288, 27 S. Ct. 137, 17 Am. Bankr. Rep. 63. The circumstances under which the power shall be exercised and the extent to which it shall be carried are matters of state policy, to be decided by the state legislature. There is nothing in the Federal Constitution which operates to restrain a state from terminating absolutely and unconditionally the existence of a state-created corporation, if that be authorized by the statute under which the corporation has been organized. And it hardly will be claimed that the Federal Government may breathe life into a corporate entity thus put to death by the state in the lawful exercise of its sovereign authority." * * *

"And since the Federal Government is powerless to resurrect a corporation which the state has put out of existence for all purposes, the conclusion seems inevitable that if the state attach qualifications to its sentence of extinction, nothing can be added to or taken from these qualifications by federal authority."

Neither Wisconsin nor any other state can tax the Railroad Company or any other Federal corporation out of existence, for in the case of *California* vs. *Central Pacific R. Co.,* 127 U. S. at 41, 32 L. Ed. at 158, the Court said: "In view of this description of the nature of a franchise, how can it be possible that a *franchise granted* by *Congress* can be *subject to taxation by a State without the consent of Congress?* Taxation is a burden, and may be

laid so heavily as to destroy the thing taxed, or render it valueless. As Chief Justice Marshall said in *McCulloch* vs. *Maryland,* 17 U. S. 4, Wheat. 316 (4:579), 'the power to tax involves the power to destroy'. Recollecting the fundamental principle that the Constitution, laws and treaties of the United States are the supreme law of the land, it seems to us almost absurd to contend that a power given to a person or corporation by the United States may be subjected to taxation by a State. The power conferred emanates from, and is a portion of, the power of the government that confers it. *To tax it is not only derogatory to the dignity, but subversive of the powers, of the government,* and *repugnant to its paramount sovereignty.''*

The railroad company under its charter and the laws of Congress had no authority to and could not lease or convey or by any other contract turn over its entire road and property to another corporation nor could it lease or convey or by any other contract turn over its road and property in the State of Oregon unless it was specifically authorized by the statute creating it to do so; nor could the railway company receive the property of the railroad company by any of the means above mentioned in the State of Oregon under the law and facts determined in *Oregon Railway and Navigation Company* vs. *Oregonian Railway Company,* 130 U. S. 1; 32 L. Ed. 837 (1888), quoting *Thomas* vs. *West Jersey Railroad,* 101 U. S. 71; 25 L. Ed. 950; *Pennsylvania R. Co.* vs. *St. Louis, etc., Co.,* 118 U. S. 290, 309; 30 L. Ed. 83, 92; *Charles River Bridge* vs. *Warren Bridge,* 36 U. S. 11; 9 L. Ed. 773, and many English and American cases.

This Oregon Co. decision *prohibited* the exchange of stock or so-called reorganization or *void* foreclosure of 1896 of the railroad company not only *in* the State of *Oregon,* but also in the States of *Wisconsin, Minnesota, Montana, Idaho* and *Washington.* The Oregonian Railway Company was organized under the laws of Scotland and the Oregon Railway & Navigation Company under the laws of the State of Oregon. In the Oregon Co. case it was contended that leases and acts *ultra vires* of the char-

ter and statute could not be attacked by the railroad companies, but would have to be by the state, which contention was not sustained but overruled, and the Court held that: The plaintiff, the Oregonian Railway Company (Limited) organized under the laws of Great Britain, with such aid as the Statute of Oregon gives to it in reference to business done in that State, had no power to execute the lease of its railroad to the defendant company, mentioned in the opinion.

It was also held that the Oregon Railway and Navigation Company, the defendant in the action, organized under the Laws of the State of Oregon, had not the legal capacity and lawful power to make said lease on its part.

* * * * *

The Court said: "It may be considered as the *established doctrine of this court* in regard to the *powers of corporations,* that they are *such and such only* as are *conferred* upon them by the Acts of the Legislatures of the several States under which they are organized. A corporation in this country, whatever it may have been in England at a time when the Crown exercised the right of creating such bodies, can only have an *existence under the express law* of the State or *Sovereignty by which it is created.*"

* * * * *

"This proposition has been before this court more than once in recent years. It was very fully considered in *Thomas* vs. *West Jersey Railroad Company,* 101 U. S. 71 (25:950), which resembled the case before us in several important features."

* * * * *

"The question turned altogether upon the power of the railroad company, under its charter and the Laws of New Jersey, to make the lease by which its road was turned over for twenty years to the absolute control of other parties. The right to do this was asserted under the following language in the charter of the company:

"That it shall be lawful for the said company, at any time during the continuance of its charter, to make contracts and engagements with any other corporation, or with individuals, for the transporting or conveying any kinds of goods, produce, merchandise, freight, or passengers, and to enforce the fulfillment of such contracts.

"But the court said that it was impossible under any sound rule of construction to find in this language *a per-*

mission to sell, lease or transfer to others the entire railroad and the rights and franchises of the corporation."

"The cases of *Ashbury Railway Carriage & Iron Company* vs. *Riche,* L. R. 7, H. L. 653, decided in the House of Lords in 1875, and *East Anglian Railway Co.* vs. *Eastern Counties Railway Company,* 11 C. B. 775, were also reviewed, with several others of a similar character from the reports of the highest courts of England, in which, as this court said—

'The broad doctrine was established that a contract not within the scope of the powers conferred on the corporation *cannot* be *made valid* by the *assent* of *every one* of the *shareholders,* nor can it by any partial performance become the foundation of a right of action.'

Reference was also made in the same opinion to the case of *York & Maryland Line Railroad Company* vs. *Winans,* 58 U. S. 17 How. 30 (15:27), which held that a corporation which has undertaken to construct and operate a *railroad cannot, by alienating* its *right* to *use* and its *powers* of control and *supervision, avoid* the *responsibility* that it *assumed* in accepting the *charter.* The court said: 'The corporation *cannot absolve* itself from the performance of its *obligations without the consent* of the *Legislature.*' To this effect were cited *Beman* vs. *Rufford,* 1 Sim. N. S. 550, and *Winch* vs. *Birkenhead, L. & C. J. R. Co.,* 13 Eng. L. & Eq. 506.

Afterwards in *Green Bay & M. R. Co.* vs. *Union Steamboat Co.,* 107 U. S. 98 (27:413), the case of *Thomas* vs. *West Jersey R. Co., supra,* was referred to with approbation.

Still later, in the case of *Pa. R. Co.* vs. *St. Louis, A. & T. H. R. Co.,* 118 U. S. 290, 309 (30:83, 92), where the whole question was reconsidered after a full argument, the conclusion was stated in the following language:

'We think it may be stated, as the just result of these cases and on sound principle, that unless *specially authorized* by its charter, or aided by some other legislative action, a railroad company cannot, by lease or any other *contract turn over to another* company, for a long period of time, its road and all its appurtenances, the use of its franchises, and the *exercise of its powers; nor* can any *other* railroad company *without similar authority* make a contract to *receive* and *operate* such road, franchises, and property of the first corporation and that such a contract is not among the ordinary powers of a railroad company,

and is not to be presumed from the usual grant of powers in a railroad charter.'

It may be considered that this is the Law of the State of Oregon, except as it has been altered or modified by its Constitution and statutes."

* * * * *

"We have examined with much care the two statutes already referred to concerning incorporations, enacted in accordance with that constitutional provision, and do not find any express authority for a railroad company to lease its road for an indefinite period, or for it to take such a lease; nor are we able to find any general language in those statutes, or either of them, in relation to the powers that may be conferred upon corporations, which justifies a departure from the principles laid down in *Thomas* vs. *Railroad Company.*

It is to be remembered that where a statute making a grant of property, or of powers, or of franchises, to a private individual or a private corporation, becomes the subject of construction as regards the extent of the grant, the universal rule is that in *doubtful points* the construction shall be against the grantee and in favor of the Government or the general public. As was said in the case of *Charles River Bridge* vs. *Warren Bridge,* 36 U. S. 11, Pet. 420 (9:773): 'In this court the principle is recognized that in *grants by the public nothing passes by implication.*' See also *Dubuque & P. R. Co.* vs. *Litchfield,* 64 U. S. 23, How. 66 (16:500); *St. Clair Co. Turnpike Co.* vs. *Ill.,* 96 U. S. 63 (24:631).

Therefore, if the articles of association of these two corporations, instead of being the mere adoption by the corporators themselves of the declaration of their own purposes and powers, had been an Act of the Legislature of Oregon conferring such powers on the corporation, they would be subject to the rule above stated and to rigid construction in regard to the powers granted. How much more, then, should this rule be applied, and with how much more reason should a court called upon to determine the powers granted by these articles of association construe them rigidly, with the stronger leaning in doubtful cases in favor of the public and against the private corporation."

* * * * *

"It is strenuously argued, and with some degree of plausibility, that the language of this proviso and the use

of the words *successors* and *assigns* in other statutes, which are referred to, imply that by the law of Oregon railroad companies may make, and must be supposed to be capable of making, assignments. But whatever may have been the intent in the minds of the legislators in using these words, it *is not precisely the form in which we would expect to find a grant of the power to sell,* to *lease,* or to *transfer* the title, ownership or *use of railroad* lines, the property belonging thereto, and the franchises necessary to carry them on, by one corporation to another.

One of the *most important powers* with which a corporation can be invested is the *right to sell out its whole property,* together with the franchises under which it is operated, or the *authority* to *lease* its property for a long term of years. In the case of a railroad company *these privileges, next* to the *right to build* and operate its railroad, would be the *most important which could be given it,* and this idea would impress itself upon the Legislature. Naturally, we would look for the *authority* to *do* these *things* in some *express provision* of law. We would suppose that if the Legislature saw fit to confer such rights *it would do so in terms which could not be misunderstood.* To infer, on the contrary, that it either intended to confer them or to recognize that they already existed, by the simple use of the word *assigns, a very loose* and *indefinite term,* is a stretch of the power of the court in making implications which we do not feel to be justified."

The legislators who enacted these statutes may have had an idea that there were certain things which corporations could assign; they may have used the expressions to which we have referred in a *very loose* instead of a *technical sense;* or they may have supposed that cases might arise where the railroad property going by some operation of law, as bankruptcy or foreclosure, from the hands of its orignial owners into the possession of other persons, would justify the description of the latter by the words *successors and assigns.* In using these terms they may have thought that *authority might be given by future statutes,* either generally to all corporations or to *some special organization,* to sell or transfer the corporate property or some part of it. But whatever may have been their purpose, we think the *argument is a forced one, which would vest in railroad companies* the *general power to sell or* lease their property or franchises, or to make contracts to buy or take leases of the same from other railroad cor-

porations, *from the use* which is made of these indefinite terms *"successors or assigns"*.

* * * * *

The language used in the statute in question in this case is stronger than that in other cases cited to us by counsel, and we are of opinion that they do not, any of them, *nor do they collectively, establish* the proposition, that by the *Laws of Oregon* a *railroad* company could *sell or lease* its *entire property,* franchises and powers to another company, *or take a grant or lease* of similar property or franchises from any other person or company."

We believe it important and request that the Court read the quotations in the Appendix from the following cases equally as strong on these questions: Charles River Bridge case, p. 50; *Thomas* vs. *West Jersey,* p. 55; *P. R. R.* vs. *St. L. &c., Co.,* p. 55.

In *Roberts* vs. *Northern Pacific Railroad Co.,* 158 U. S. 1; 39 L. Ed. 873 at 879, 880, attorney for the Railroad Co., the Court said: "It is contended, on behalf of the plaintiffs in error, that where the question involves the powers of a state corporation, and the meaning and effect of the constitution and laws of a state, it is the duty of this court to adopt the decisions of the courts of such state. But we do not perceive that the doctrine of *Whiting* vs. *Sheboygan & F. du L. R. Co., supra,* and of the cognate Wisconsin cases, is fairly applicable to the case before us. *There are two very important particulars in which the present case differs from those adjudicated by the Wisconsin courts,* and which, we think, warrant an opposite conclusion. In the first place, the transaction between the county of Douglas and the Northern Pacific Railroad Company did not involve the exercise of the taxing power of the county. The county did not issue bonds, or seek to subject itself to any obligation to raise money by taxation. The case, as already stated, was that of a sale. The county authorities had ample powers to sell and convey such of its lands as were not used or dedicated to municipal purposes.

* * * * * *

By an Act aproved April 10, 1865, the legislature of the state of Wisconsin, declared that, *for the purposes set forth in said Act of Congress,* and *to carry the same into full effect,* the Northern Pacific Railroad Company was *vested with all the rights, powers, privileges and immunities within*

the limits of the state of Wisconsin which were *given by said Act of Congress.*

* * * * * *

Hence, if the contention were true that the state of Wisconsin through its judiciary, can deprive that portion of the railroad within its borders of its national character, and declare the Northern Pacific Railroad Company to be a priavte corporation not engaged in promoting a *public purpose,* the same would be true of the other states through which the road passes. *Such a contention,* we think, *cannot be successfully maintained.*

Congress has power "to regulate commerce with foreign nations and among the several states," and to "establish postoffices and post roads." Const. art. 1, sec. 8, par. 3 and 7. As was said in *Pensacola Teleg. Co.* vs. *Western U. Teleg. Co.,* 96 U. S. 10 (24:710), "The government of the United States, within the scope of its powers, operated upon every foot of territory under its jurisdiction. It legislates for the whole nation, and is not embarrassed by state lines. Its peculiar duty is to protect one part of the country from encroachments by another upon the national rights which belong to all;" and it was held, that a law of the state of Florida which attempted to confer upon a single corporation of its own, the exclusive right of transmitting intelligence by telegraph over a certain portion of its territory, was inoperative against a corporation of another state, where Congress had enacted "that any telegraph organized under the laws of any state should have the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States," and where such other corporation had secured a right of way by private arrangements with the owners of the land. This principle has been repeatedly recognized by this court in numerous decisions. *Western U. Teleg. Co.* vs. *Texas,* 105 U. S. 460 (26:1067.)

* * * * * *

We think, therefore that when the Circuit Court of the United States for the District of Wisconsin was called upon, in the present case, to pass upon the character, powers, and rights of the Northern Pacific Railroad Company, it was bound to regard that company as a corporation of the United States, created for national purposes and as a means of interstate commerce and *not to apply to it the*

views of the Wisconsin courts pertainng to their local railroads.

Upon the principle of these cases it is obvious that the *state of Wisconsin* at least after it had given its consent to the Northern Pacific Railroad Company to enter into its territory and construct its road, and such consent had been acted on, *could not by hostile legislation, hamper and restrict that company in the management and control of its railroad, nor by judicial decisions of its courts transform a corporation formed by national legislation* for national purposes and interstate commerce into one of local character, with rights and powers restricted by views of policy applicable to state organizations.

* * * * * *

But it is further contended, on behalf of the plaintiffs in error, that whether the transaction between the county and the company was that of a sale for a sufficient consideration, or whether the Northern Pacific Railroad Company is a corporation invested with powers of a national origin and subjected to duties of a national character, were not questions open for consideration in the court below because of the case of *Ellis* vs. *Northern Pac. R. Co.*, 77 Wis. 118.

That was a case wherein J. F. Ellis, one of the plaintiffs in error in the present case, had filed a bill of complaint against the Northern Pacific Railroad Company in a circuit court of the state of Wisconsin, seeking to quiet his title to certain lots of land. These lots had been conveyed to Ellis by Roberts, who claimed to have purchased them from the county of Douglas, and were some of the lots sold and conveyed by that county to the Northern Pacific Railroad Company, but were not lots included in the present controversy. The railroad company demurred to the complaint; the circuit court overruled the demurrer; from the order so overruling the demurrer an appeal was taken to the supreme court of Wisconsin; and that court on May 20, 1890, affirmed the order of the circuit court, and remanded the cause for further proceedings. In its opinion the court said: "There is nothing to distinguish this case, or to take it out of the decision in the Whiting case; for if the county could not donate money or securities to the railroad corporation it could not give its lands, which are the property of the county."

It is observable that the court's attention does not

seem to have been drawn to those facts which are calculated to justify a finding that the transaction was a sale on consideration, and not a donation, nor to the real character of the Northern Pacific Railroad Company *as a national organization,* and thus distinguish from a local railroad company, which was dealt with by the Wisconsin courts in the Whiting case. This inattention by the supreme Court of Wisconsin to such important particulars was probably occasioned by the fact that the case was before them on a demurrer by the company to the complaint of Ellis. It is further to be observed that no final judgment was entered by the supreme court of the state, but the cause was remanded to the court below for further proceedings.

The law is also well settled that a Congress granted Telegraph Franchise and right of way cannot be voluntarily sold or lost to another grantee or successor.

This rule and law is well expressed in *U. S.* vs. *U. P. R. C.,* 160 U. S. 1; 40 L. Ed. 316, 334, upon Act of Congress granting right of way in 1862 substantially same as that of N. P. R. Co. of July 2, 1864, as follows: "In reference to the agreements of 1869 and 1871 between the Union Pacific Railroad Company and the Atlantic & Pacific Telegraph Company, but little need be said to show that they were void. By those agreements the former corporation demised and leased to the telegraph company, to whose rights, it may be assumed, the Western Union Telegraph Company succeeded, all the telegraph lines, wires, poles, instruments, offices, and other property appertaining to telegraph business, that were possessed by the railroad company. These agreements were annulled by the circuit court, and it was likewise so adjudged by the circuit court of appeals. The same conclusion had been previously announced by Judge McCrary in *Atlantic & P. Teleg. Co.* vs. *Union P. R. Co.,* 1 McCrary, 541, 547. That able judge well said: 'I conclude that the charter of the Union Pacific Railroad Company devolved upon it the duty of constructing, operating, and maintaining a line of telegraph for commercial and other purposes and that this is in its nature a public

duty. I am further of the opinion that, by the provisions of the contract of September 1, 1869, and of December 20, 1871, the ralroad company undertook to lease or alienate property which was necessary to the performance of this duty. The consideration for these contracts is declared to be "the demise of their telegraph lines, property, and goodwill, and of the rights and privileges, in the manner hereinafter specified," etc.; and the property demised by the railroad company is 'all its telegraphic lines, wires, poles, instruments, offices, and all other property by it possessed, appertaining to the business of telegraphing, for the purpose of sending messages and doing a general telegraph business.' The lessee was to hold during the whole term of the charter of the railroad company and any renewal thereof. There is inserted a stipulation that the lessee shall perform all the duties imposed or that may be imposed upon the railroad company by their charter or by the laws of the United States. But, as already intimate I do not think this latter clause makes the contract good. The railroad company was not at liberty to transfer to others those important duties and trusts which it, for a large consideration and for a great public purpose, had undertaken to perform. It certainly could not devest itself of these powers and duties, and devolve them upon the plaintiff without express authority from Congress."

* * * * * *

"But if the *contracts* in question are not *ultra vires* by reason of the transfer of property necessary to the performance, by the railroad company, of its public duties, *they are so because they attempt to transfer certain franchises of the said company.* The right to operate a telegraph line, and to fix and to collect tolls for the use of the same, is, to say the least, the most valuable part of the franchise conferred by Congress upon the railroad company as a telegraph company. This right is alienated by a clear and unequivocal assignment or transfer from the railroad company to the plaintiff. Without discussing other features of the contracts, I am compelled to hold that *this*

feature is *alone sufficient* to *render them* in *excess* of the *corporate power* of the company."

* * * * * *

But that agreement is illegal, not simply to the extent that it assumes to give to the Western Union Telegraph Company exclusive rights and advantages in respect of the use of the way of the railroad company for telegraph business, but it is *also illegal because,* in effect, *it transfers* to the *Western Union* Telegraph Company the *telegraphic franchise granted* it *by* the government of the *United States.* The duty to maintain and operate a telegraph line between the points specified in the Act of 1862 was committed by Congress to certain corporations which it named, and neither they, *nor any corporation* into which they were merged, could, *without the consent of Congress, invest* a *state corporation* with exclusive telegraphic privileges on the line of the roads it then owned or thereafter acquired. The United States was not bound to look to the Western Union Telegraph Company for the discharge of the duties the performance of which in consideration of the aid received from the government, the Union Pacific Railroad Company, and other named companies, undertook to discharge for the benefit of the United States and of the public. No agreement with the telegraph company, to which the assent of the govenment was not given, could take from the railroad company its right at any time to itself maintain and operate the telegraph line required by the act of 1862 for the use of the government and of the public, nor impair the power of Congress to require the performance by the railroad company itself of the duties imposed by that act."

U. S. vs. *N. P. Ry. Co. & Western Union Telegraph Co.,* 160 U. S. 1; 40 L. Ed. 316, *334.*

This would seem to be conclusive that the right and franchise of the N. P. R. R. Co., to construct and operate a perpetual telegraph public system and railroad for its use as well as for public use and government use could not be alienated by contract without consent of the U. S.

In *Pullman Palace Car Co.* vs. *Central Transportation Co.,* 139 U. S. 24, 35 L. Ed. 55 at 68, the Court said: "The powers of corporations organized under legislative statutes are such, and such only, as those statutes confer. Conceding the rule applicable to all statutes, that what is fairly

implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that the enumeration of these powers implies the exclusion of all others." 101 U. S. 82 (25: 952.)

"There is another principle of equal importance, and equally conclusive against the validity of this contract, which, if not coming exactly within the doctrine of *ultra vires* as we have just discussed it, *shows very clearly that the railroad company was without the power to make such a contract.* That principle is that, where a corporation, like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of these functions being the consideration of the public grant, any contract which undertakes, *without the consent of the State,* to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the State, and is void as against public policy." 101 U. S. 83 (25: 952).

It was also held in that case that the lease was not made valid by a subsequent Act of the Legislature, regulating the rates of fares and freights to be charged by "the directors, lessees or agents of said railroad,"—the court saying: "It is not by such an incident use of the word 'lessees,' in an effort to make sure that all who collected fares should be bound by the law, that a contract unauthorized by the charter, and forbidden by public policy, is to be made valid and ratified by the State." 101 U. S. 85 (25: 953.)

In *Branch* vs. *Jesup,* Mr. Justice Bradley delivering judgment said: "Generally the power to sell and dispose has reference only to transactions in the ordinary course of business incident to a railroad company, and does not extend to the sale of the railroad itself, or of the franchises connected therewith. Outlying lands, not needed for railroad uses, may be sold. Machinery and other personal property may be sold. But the road and franchises are generally inalienable, and they are so, not only because they are acquired by legislative grant, or in the exercise of special authority given for the specific purposed of the incorporating Act, but because they are essential to the fulfillment of those purposes; and it would be a dereliction of the duty owed by the corporation to the State and to the public to part with them." * * *

"In *Pittsburgh, C. & St. L. R. Co.* vs. *Keokuk & H. Bridge Co.*, it was stated, as the result of the previous cases in this court, that "a *contract* made by a corporation, which is *unlawful* and *void* because beyond the scope of its corporate powers, *does not, by being carried into execution, become lawful and valid,* but the proper remedy of the party aggrieved is by disaffirming the contract, and suing to recover, as on a *quantum meruit,* the value of what the defendant has actually received the benefit of." 131 U. S. 371, 389 (33: 157, 163).

The view which this court has taken of the question presented by this branch of the case, and the only view which appears to us consistent with legal principles, is as follows:

A contract of a corporation, which is *ultra vires,* in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the Legislature, is not voidable only, *but wholly void,* and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. *No performance* on either side *can* give the unlawful contract any validity, or *be the foundation of any right of action* upon it.

When a corporation is acting within the general scope of the powers conferred upon it by the Legislature, the corporation, as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities which are prerequisites to its existence or to its action, because such requisites might in fact have been complied with. But when the contract is beyond the powers conferred upon it by existing laws, either the corporation, nor the other party to the contract, can be estopped, by assenting to it, or by acting upon it, to show that it was prohibited by those laws.

POINT 12.

That there was no foreclosure nor passing of title of the properties, assets or lands of the railroad company in 1896, but only an exchange of securities similar to the proceedings of 1875, and the Federal Courts did not have jurisdiction of the subject matter, nor of the necessary parties—one necessary party—the United States,—was not made a party to the litigation; all of the decrees were and are null and void in fact and on the face of the record.

Under this Point there will also be considered assignment of error XVII (see appendix, p. 77).

In 1896 Morgan and his attorneys knew that the railroad company owned the Railway Company and that while all done was illegal, void and null because without legal authority thereby title remained in the Federal corporation and the Railway Company is only operating the system and it holds practically all the stock of the Railroad Company, and therefore a return to the former status could easily, without difficulty or legal proceedings, be restored; the Railroad Company has title and can readily resume operating the system: the mortgages and Voting Trusts of the Railway Company so provide.

Congress by the Act of 1822 opened the door for such a restoration and resumption of possession and operation by the Railroad Company—it in effect and tacitly invited same and directed the Attorney General to recommend necessary legislation to that end.

The Colton Report and the Act of 1929, as well as Act of July 1, 1898, indicate a strong implication that the Railway Company does not own but only operates the system—a holding or operating company—which operation can be easily ended as it is forbidden under *Pa R. C.* vs. *St. Louis, &c., Co.,* quoted in the Oregon Railway Company case, and is quoted in the appendix, p. 55).

In the Boyd case the opinion of the three courts are a most vigorous, trenchant indictment and condemnation of the Railway Company. They played hot and cold with

the courts, Congress and the stockholders as conditions best suited their unlawful schemes, whims and interests.

If title to the Railroad properties had passed in 1896 why was the Mt. Rainer Nat. Park deed to the U. S. of July 19, 1899 (JCC 2549), made by the Railroad Co.? Why did the Gov't require, and the Railway Co. agree to, a deed by the Railroad Co.? That the U. S. would not take the Railway Co. deed is evident from the Statute of July 1, 1898.

In the Reorganization Plan and Statement it is set forth that the lien of the 2nd and 3rd mortgages is only upon the main line, the Cokedale Spur, ½ of the line, Carlton to Duluth, and upon the Land Grant, yet in entering the decree it was declared that the 2nd mortgage is a lien not only upon those things but "upon all the stocks and bonds in other companies owned by the defendant, "The Northern Pacific Railroad Company, at the time of the appointment of receivers * * * October 13th, 1893, other than stocks and bonds, pledged under the Consolidated Mortgage, and all the right, title and interest of said defendant—in such pledged stocks and bonds, subject to the rights of the pledgees thereof."

The sale was decreed accordingly under the mortgage.

These decrees were *consent decrees,* acquiesced in by the Directors and "Protective Committee" of the railroad company in furtherance of the unlawful plan to acquire the property of the railroad company for the railway corporation.

It is more than probable that Judge Jenkins never read the decrees.

The lands and land grants west of the Missouri River and covered by the terms of the mortgage were sold under a supplemental decree in a manner directly contravening the resolution of Congress, under which it is contended, the mortgages were executed, and also contravening the Act of Congress of March 3rd, 1893.

These lands are upwards of thirty millions of acres, and are worth many millions of dollars.

The resolution of Congress of 1870 stipulated as follows:

"If the mortgage hereby authorized shall at any time be enforced by foreclosure, * * * or the mortgaged lands hereby granted, or any of them, be sold * * * such lands shall be sold at public sale at places within the states and territories in which they shall be situate after not less than sixty days previous notice, *in single sections or sub-divisions thereof* to the highest and best bidder."

By Section 1 of the Act of Congress of March 1st, 1893, it is provided:

"That *all real estate* or *any interest in land* sold under any order or decree of any United States Court, shall be sold at public sale at *the court house of the county, parish, or city in which the property or the greater part thereof is located,* or upon the premises, as the court rendering such order or decree of sale may direct."

The following and other violations of the law were had in these proceedings:

First: All the lands, patented and unpatented, were sold in but one place in each of the states in which the lands were situated, *and not in the respective counties where situated.*

Second: The lands for which patents had not been issued *were not sold in single section or sub-divisions,* but were sold lumpingly at the place in each State as above stated, for the sum of $500,000 for the lands in each State.

To acquire the remaining lands in Minnesota and North Dakota, east of the Missouri River, and not covered by the mortgage, the same being expressly except,—the railway company experienced great difficulty and had to wait three years until 1899 when a null and void order to sell *in sequestration proceedings* was made upon the Petition of the Receivers. The Receivers took the precaution to have sales made in each county of the State, but the unpatented, unsurveyed and unlocated lands were sold lumpingly and not in single sections or sub-divisions. "With respect to lands it is quite certain that sequestrators acquire no title and hence can make no sale." Freeman on Executions, 125(a). A receiver in sequestration proceedings *acquires no title to the real estate* and has but a right to the *possession. Forster* vs. *Townsend,* 48 N. Y. 203.

After acquiring the property thus sold, the new company obtained two further and separate decrees, *one in August, 1696,* decreeing a sale to it for the face value of the outstanding receiver's certificates (all of which it held), of all the securities—millions in value of excess—deposited as collateral for the payment of such certificates—and one *other decree in October, 1896,* of all the securities (over 33 millions in value) deposited as collateral for the payment of the Collateral Trust Notes which amounted to but 10 millions of dollars, and all of which were deposited with the Reorganization Managers under the Reorganization Plan to be settled for by the payment of but 7% in cash and the balance in bonds and stock of the new company.

These were collusive and illegal consent decrees and at the time *practically the same directors* acted for both companies. *The railroad company lost—the railway company profited* to the extent of many millions of dollars by the transactions.

In a petition sworn to by the receivers of the railroad company dated September 3, 1897, filed in the United States Circuit Court for the Eastern District of Wisconsin it is stated that the lands of the grant in Minnesota and North Dakota east of the Missouri River amounted to 3,738,874 acres and cited the general first mortgage, the amount of which on March 6, 1896, according to the plan, was $41,-879,000. By another fraudulent, consent and collusive decree of April 27, 1899, and a decree amending it November 25, 1899 (JCC 1441-45), this plan of sale was arranged by the group controlling the then railway system as part of its fraudulent and collusive scheme to capture, hold and prevent anyone else from buying and purchasing lands of the railroad company as no one could buy one or more single sections without taking it subject to the $41,879,000 of the first trust, as there was no arrangement under the trust or in the decree or proceedings whereby single or group sections could be released from the trust. The sale under these decrees was not carried out according to and was in contravention of the charter and the statutes, and

the sale having been made to the railway company, the Court, on affirming the report, entered a deficiency judgment of "more than $87,000,000" in favor of the railway against the railroad, without any jurisdiction to do so. Ash Sheep Co., 252 U. S. 159, 64 L. Ed. 507, quoted under Point 13.

These 3,738,874 acres were sold for $837,850 and the railway paid in cash because it was required to make a deposit of 10% at the sale in the amount of $83,785, leaving a balance on the purchase price of $757,075, which the Court allowed it to offset against the deficiency judgment for more than $87,000,000, leaving a balance on the deficiency judgment of "more than $86,242,925."

This judgment was fraudulent and obtained under an unlawful and illegal consent and collusive decree on bonds of the railroad company which had been paid and satisfied in the purchase price under the so-called reorganization plan and the railway company had issued its new bonds in lieu of same and had certified to those taking the bonds and the public, to whom the bonds were offered, that the bonds of the railway company so issued were first liens on the property of the railroad company.

This so-called fraudulent and collusive judgment of a balance of more than $86,242,925 was taken in part for the purpose of trying to hold or establish some kind of lien on the lands and property of the railroad company, as the parties to the said collusive agreement and decrees realized that they did not pass valid title from the railroad company to the railway company.

The so-called foreclosure sale in 1896 likewise was fraudulently and collusively arranged so that all of the lands and property of the railroad company described in the decree would be sold subject to the then first mortgage, and the portion covered by the Missouri Division would be sold subject to the first mortgage and the Missouri Division mortgage which amounted at that time to $1,815,500. The land covered by the Pend d'Oreil was sold subject to the first mortgage and to the Pend d'Oreil mortgage, which

then amounted to $357,000, thus making it imperative that all the land be bought by one person or corporation, and that settlers, individuals and smaller corporations could not buy part without taking it subject to and being liable for the first mortgage and, if covered by them, the Missouri Division mortgage and the Pend d'Oreil mortgage.

Lack of Jurisdiction by the Court can be attacked collaterally and the Supreme Court in *Thompson* vs. *Whitman,* 18 Wall. 457; 21 L. Ed. 897, found and determined that neither the constitutional provision that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state, or the Act of Congress passed in pursuance thereof, prevents an inquiry into the jurisdiction of the court by which a judgment offered in evidence was rendered. The record of a judgment rendered in another state may be contradicted as to the facts necessary to give the court jurisdiction, and if it be shown that such facts did not exist, the record will be a nullity, notwithstanding it may recite that they did exist. Want of jurisdiction may be shown, either as to the subject-matter or to the person, or in proceedings *in rem* as to the thing. By a law of New Jersey, non-residents were prohibited from raking clams and oysters in the waters of that state, under penalty of forfeiture of the vessel employed; and any two justices of the county in which the seizure of the vessel should be made were authorized, upon information given, to hear and determine the case; held that if the seizure was not made in the county where the prosecution took place, the justices of that county had no jurisdiction, and that this fact might be inquired into in an action for making such seizure, brought in New York, notwithstanding the record of a conviction was produced, which stated that the seizure was made within such county.

Tungsten vs. *Ickes,* 66 App. D. C., 3; 84 F. (2d) 257, the Court held that District of Columbia Supreme Court's consent order for entry of mandamus judgment, commanding Secretary of Interior to ascertain whether corporation incurred losses claimed in its petition for review of Sec-

retary's decision allowing in part its claim for other losses under War Minerals Relief Act, held nullity as beyond court's jurisdiction; as the claim set up in petition being new and not made within statutory time.

* * * * * *

The Court's lack of jurisdiction cannot be waived, nor jurisdiction supplied, by parties' consent or silence.

The Court said that "in this view, it is apparent that when the consent order, to which we have made reference, was entered, the record showed that here was not present in the case a dispute within the jurisdiction of the court; and hence it follows inevitably that no valid order on the merits could then be entered. 'Courts are constituted by authority and they cannot go beyond the power delegated to them. If they act beyond that authority, and certainly in contravention of it, their judgments and orders are regarded as nullities. They are not voidable, but simply void.' *Vallely* vs. *Northern F. & M. Ins. Co.,* 254 U. S. 348, 41 S. Ct. 116, 117, 65 L. Ed. 297. And so here the consent order that was entered, being beyond the court's jurisdiction, was a nullity. The defect was not formal or modal. It was jurisdictional. It was indispensable, in the circumstances, that jurisdiction should be shown, for until it was shown there was nothing on which the court could act."

* * * * * *

"Nor can this lack of jurisdiction be waived, *United States* vs. *Mayer,* 235 U. S. 55, 35 S. Ct. 16, 59 L. Ed. 129; nor will consent or silence supply it, *Chicago, B. & Q. R. Co.* vs. *Willard,* 220 U. S. 413, 31 S. Ct. 460, 55 L. Ed. 521."

In *Vallely* vs. *Northern F. & M. Ins. Co.,* 254 U. S. 348, 65 L. Ed. 297 at 299, 301, the Court held and said: "Courts are constituted by authority, and they cannot go beyond the power delegated to them. If they act beyond that authority, and certainly in contravention of it, then *judgments* and orders are regarded as *nullities.* They are (354) *not voidable,* but *simply void,* and this *even prior* to *reversal. Elliot* vs. *Peirson,* 1 Pet. 328, 340, 7 L. Ed. 164, 170; *Old Wayne Mut. Life Asso.* vs. *McDonough,* 204 U. S. 8, 51 L. Ed. 345, 27 Sup. Ct. Rep. 236."

In *Boyce* vs. *Grundy,* 34 U. S. 275 (9 Peters), 9 L. Ed. at 288, the Court held and said: "We are of opinion that the decree is erroneous in this respect. In the first place,

the court had *no jurisdiction* to *decree* a *sale* to be made of *land* lying in *another State,* by a master acting under its own authority."

In *United States* vs. *Mayer,* 235 U. S. 55: 59 L. Ed. 129, at 136 the court said: "2. As the district court was without power to entertain the application, the consent of the United States attorney was unavailing. *Cutler* vs. *Rae,* 7 How. 729, 731, 12 L. Ed. 890, 891; *Byers* vs. *McAuley,* 149 U. S. 608, 618, 37 L. Ed. 867, 872, 13 Sup. Ct. Rep. 906; *Minnesota* vs. *Hitchcock,* 185 U. S. 373, 382, 46 L. Ed. 954, 961, 22 Sup. Ct. Rep. 650. It is argued, in substance, that while consent cannot give jurisdiction over the subject-matter, restrictions as to place, time, etc., can be waived (Citations). This consideration is without pertinency here, for there was no general jurisdiction over the subject-matter, and it is not a question of the waiver of mere "modal or formal" requirements, of mere private right of personal privilege."

In the appendix are quotations on this Point from *Vallely* vs. *N. F. & M. Co.,* p. 57; *Chicago B. & Q. Co.* vs. *Willard,* p. 59.

Kansas City S. R. Co. vs. *Guardian Trust Co.,* 60 L. Ed. 579 at 589, 590.

"The appellant urges that the foreclosure sale is to be treated as a distinct transaction,—that after it had become the owner of the greater part of the bonds and stock of the Belt Company it was free to do as it pleased. If it had simply kept the stock it would have incurred no liability to creditors of the Belt Company, and an independent foreclosure would put it in no worse place. But *the ownership* of the Belt Road by the new company was *contemplated from the first,* and although no fraud on creditors was suggested or intended in the plan, still the court of appeals was justified in regarding the whole proceeding as one from the start to the close, and in throwing on the appellant the responsibility of so carrying it out as to avoid inequitable results. * * * In short, while it is true that reorganization plans often would fail if the old stockholders could not be induced to come in and to contribute some fresh money, and that the necessity of such arrangements

should lead courts to avoid artificial scruples, still we are not prepared to say that the court of appeals was wrong in finding that there had been a transgression of the well-settled rule of equity in this case, or that it went further than to see that substantial justice should be done''

In the book entitled ''Some Legal Phases of Corporate Financing, Re-Organization and Regulation,'' by Francis Lynde Stetson, James Byrne, Paul D. Cravath, George W. Wickersham, Gilbert H. Montague, George S. Coleman and William D. Guthrie, it is stated at page 212: ''Except in a comparatively rare case of redeemable preferred stock, there is usually *no way* in a *voluntary readjustment* by which the *status* of *stock can be changed without* the *consent* of its *holders,* nevertheless it becomes necessary in such a case *to continue the non-assenting* stock *without disturbing its status,* except so far as may be permitted by the exercise of the *powers* expressly *conferred* by the *corporation's charter* or by the statute subject to which the corporation was reorganized.''

This book also says that they *hoped* to *be relieved* from the *terrors* of the *Boyd case,* but instead it was practically re-affirmed in *Kansas City Southern Railroad Co.* vs. *Guardian Trust Co.,* 240 U. S. 166; 60 L. Ed. 579. The non-assenting N. P. Railroad Stock on the agreed actual value in 1896 of Railroad Company properties of $345,000,000, was worth $203.00 per share of the par value of $100.

The *United States* Court in *Minnesota dismissed* the suit of the creditors and stockholders as *without* jurisdiction. The purpose of these suits in Wisconsin, Minnesota, Washington and the other states traversed by the railroad company was to stop and forestall Brayton Ives, who was president, and his associates from taking over control of the Board of directors and the property of the railroad company, which control they were just about to obtain.

Because of differences of opinion in the different districts a friendly petition by consent was presented to the four associate justices of the Supreme Court of the United States who were assigned to the four circuits traversed

by the railroad company, seeking to have the Wisconsin Court made the primary court. The ruling and order thereon reported in 72 F. 30, made by the four justices, *who were not legally sitting as a Court,* seems to have been had solely because desired and agreed to by all parties to the record. The order made, it will be perceived, is *confined* to the *foreclosure* and *no mention* is made of the *creditors' bills;* yet there were vast land grants east of the Missouri River, several million acres in Minnesota and large acreages in North Dakota, all of which were expressly exempt from the operation of the mortgages.

In the opinion of three of the justices they state: *"In expressing these views, we are not to be understood as passing upon the proposition advanced in argument, but not necessary to be here considered, that it is competent for a circuit court of the United States, by consent of parties, to foreclose the mortgage of a railroad, no part of which is within the territorial jurisdiction of such Court."*

Mr. Justice Brown's opinion was that the Wisconsin Court had no jurisdiction to foreclose the mortgage but he acceded to the wishes of the others as a matter of expediency.

The decree of foreclosure directed a sale under the mortgages of stock, bonds and other property in the hands of the receivers which were not in any way covered by the mortgages.

This was entirely independent of the separate decrees directing sales to the new company by the receiver of securities pledged for Receiver's Certificates and Collateral Trust Notes.

The Texas Court after a careful review of all the Federal decisions, held that a Circuit Court of the United States in Louisiana had no jurisdiction over property in Texas such as conferred upon it the power to appoint a Receiver of a railroad in Texas owned by a corporation created by Congress. *T. & P. R. R. Co.* vs. *Gay,* 86 Texas 571: 25 L. R. A. 52.

In Brown on Jurisdiction (2nd Ed., 1901), it is said at Section 32—"The following actions were local at common

law:—all actions for the recovery of real property or any interest therein, *or the enforcement of any lien thereon,* or the enforcement of the specific performance of a contract concerning the same where the property is claimed."

In Shiras' Equity Practice in U. S. Circuit Courts (2nd Edition), at page 22, it is said: "In cases which, from the subject-matter and the relief sought with regard thereto are local in their nature, the suit must be brought in the District wherein the property sought to be reached or affected is situated, and this rule is applicable to the class of cases named in the eighth section of the Judiciary Act of 1875, being those *brought to enforce a legal or equitable lien upon,* or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property."

In Bailey on Jurisdiction at Section 55 it is said:—"In proceedings *in rem* an appearance will serve to give jurisdiction over the person, but *it is not sufficient to confer jurisdiction over the proceedings or the res.*"

Where the Court has not jurisdiction over the subject-matter of the proceeding "the judgment ultimately rendered and all proceedings had thereunder are utterly void and open to repudiation in a collateral proceeding, as well as direct attack." * * * "Objection to jurisdiction over the subject-matter is always in time." Kleber on Void Sales, Section 54.

POINT 13.

The reservations in the void decrees of 1896 leave open the question of jurisdiction of subject matter and ultra vires, and made whatever title was claimed under them, subject and subservient to lack of jurisdiction of subject matter and ultra vires and such questions are still undetermined and are open to collateral attack.

Under this Point there will also be considered assignment of error XXI (see appendix, p. 79).

On the point of *ultra vires* estoppel, in *Ward* vs. *Joslin,* 186 U. S. 142, 46 Law Ed. 1093, at 1099, the court says:

"The rule in this court is that a contract made by a corporation beyond the scope of its powers, express or implied, cannot be enforced or rendered enforceable by the application of the principle of estoppel."

* * * * *

"Whether in this case the corporation would have been estopped if it had made the defense of *ultra vires,* it did not make it and judgment went against it. We have held such judgments conclusive in proceedings under the Kansas Constitution (citing authority), but we did not there hold that it was not open for a stockholder to show that the judgment was not enforceable against him when rendered against the corporation on a contract beyond its power to make."

But in 1896 the Court did not pass on the question, but specifically reserved the points, and any mortgagees or purchasers took with notice thereof through the title papers. *Simmons Coal Co.* vs. *Doran,* below.

In *Texas & P. R. Co.* vs. *Pottorff,* 291 U. S. 245 at 260; 78 L. Ed. 777 at 786, the Court held and said:

"Second. The receiver is not estopped to deny the validity of the pledge. The Railway's argument is that the bank could not set up the defense of *ultra vires* since it had the benefit of the transaction; and that the receiver, as its representative, can have no greater right. *Neither branch of the argument is well founded.* The bank itself could have set aside this transaction. It is the *settled doctrine* of *this Court* that *no rights arise on an ultra vires* contract, even *though* the *contract* has been *performed;* and that this conclusion *cannot be circumvented by* erecting an *estoppel which* would *prevent challenging* the *legality* of a *power exercised. California Nat. Bank* vs. *Kennedy,* 167 U. S. 362, 42 L. Ed. 198, 17 S. Ct. 831; *McCormick* vs. *Market Nat. Bank,* 165 U. S. 538, 41 L. Ed. 817, 17 S. Ct. 433; *Central Transp. Co.* vs. *Pullman's Palace Car Co.,* 139 U. S. 24, 35 L. Ed. 55, 11 S. Ct. 478.

Note by the Court:

"See also *Pearce* vs. *Madison & I. R. Co.,* 21 How. 441, 16 L. Ed. 184; *Thomas* vs. *West Jersey R. Co.,* 101 U. S. 71, 21 L. Ed. 950; *Pennsylvania R. Co.* vs. *St. Louis, A. & T. H. R. Co.,* 118 U. S. 290, 30 L. Ed. 83, 6 St. Ct. 1094; *Oregon R. & Nav. Co.* vs. *Oregonian R. Co.,* 130 U. S. 1, 32 L. Ed. 837, 9 S. Ct. 409; *First Nat. Bank* vs. *Hawkins,*

174 U. S. 364, 43 L. Ed. 1007, 19 S. Ct. 739; *De la Vergne Refrigerating Mach. Co.* vs. *German Sav. Inst.,* 175 U. S. 40, 44 L. Ed. 65, 20 S. Ct. 20."

In *Ash Sheep Co.* vs. *United States,* 252 U. S. 159, and 170; 64 L. Ed. 507, affirming 250 Federal 591; 254 Federal 59, the Court at page 512 said: "It is also contended, far from confidently, that the recovery of nominal damages in the equity suit is a bar to the recovery of the penalty in the case at law. While the amount of the statutory penalty for the trespass was prayed for in the equity suit, yet the trial court, saying that equity never aids the collection of such penalties (*Marshall* vs. *Vicksburg,* 15 Wall. 146, 149, 21 L. Ed. 121, 122), and that no evidence of substantial damage had been introduced, limited the recovery to $1 and costs. *Rejection of a claim because pursued in an action in which it cannot be entertained does not constitute an estoppel against the pursuit of the same right in an appropriate proceeding.* We agree with the court of appeals that "a *judgment* is *not conclusive* of any question which, *from* the *nature* of the *case* or the form of action, *could not have been adjudicated in* the *case* in which it was *rendered*".

It results that the decree in No. 212 and the judgment in No. 285 must both be affirmed."

This is conclusive that the requirement of the decrees in 1896 that the Railroad Company execute deeds of assurance, was and is invalid and void or beyond the jurisdiction of the Court, and the deeds are likewise invalid and not an estoppel. They are likewise void under the principle of the Townsend case.

The decree confirming Special Master's Land Sales in 1896 recited: "Now come again all the parties by their respective solicitors, and comes also the *purchaser,* Northern Pacific *Railway* Company; and its petition that the several reports of Alfred L. Cary, the Special Master, heretofore filed herein, of the sales by him made of the lands and rights in respect of lands in and by the decrees herein directed to be sold, should be approved, and that the sale of said lands and *rights in respect of lands* of the Northern Pacific Railroad Company, briefly described in the notice of sale thereof, should be confirmed and made absolute, come on to be heard."

The United States was not a party to the suits but the United States held the title to "rights in respect of lands".

In *Simmons Creek Coal Co.* vs. *Doran,* 142 U. S. 417, 35 L. Ed. 1063, at 1072, the Court clearly states the rule that purchasers are required to take a notice of what is in the title papers as follows: "The rule is thus stated by the Virginia Court of Appeals, in *Burwell* vs. *Fauber,* 21 Gratt. 446, 463: 'Purchasers are bound to use a due degree of caution in making their purchases, or they will not be entitled to protection. *Caveat Emptor* is one of the best settled maxims of the law, and applies exclusively to a purchaser. He must take care, and make due inquiries, or he may not be a *bona fide purchaser.* He is bound not only by actual, but also by constructive notice, which is the same in its effect as actual notice. He must look to the title papers under which he buys, and is charged with notice of all the facts appearing upon their face, or to the knowledge of which anything there appearing will conduct him. He has no right to shut his eyes or his ears to the inlet of information, and then say he is a *bona fide* purchaser without notice.' *Jones* vs. *Smith,* 1 Hare, 43, 55; *Le Neve* vs. *Le Neve,* 2 L. C. Eq. *127; and *Brush* vs. *Ware,* 40 U. S. 15 Pet. 93, 114 (10:672, 680), are cited."

POINT 14.

By the second proviso of Section 3 of the Act of July 2, 1864 (13 Stats. 365), other railroad companies receiving grants can assign the same to the Northern Pacific Railroad Company or may consolidate, federate or associate with the Northern Pacific Railroad Company, but it is still to be the Northern Pacific Railroad company under this act, and the proviso does not permit the Northern Pacific Railroad Company to assign its grants to such other company or to be consolidated, federated, or associated into such other company so as to be absorbed by it. The statute giving authority one way and not mentioning it the other excludes the other way.

POINT 15.

The reservations in the so-called Plan, etc., of 1896, in the Voting Trust and in the mortgages of the railway company, estop all parties to claim that any title or right of possession ever passed from the railroad company.

Points 14 and 15 will be considered with assignments of error XIII and XVII (see appendix, pp. 75, 77).

The fake foreclosure of 1896 was invalid and void as to the railroad property and stock securities in the State of *Minnesota,* and the *railway company* and railroad company are *estopped* to *deny* such *invalidity* thereof *by Pearsall* vs. *Great Northern Railway Company,* 161 U. S. 646; 40 L. Ed. 383, where the Court found and determined: "This was a bill in equity filed by Pearsall, a stockholder in the Great Northern Railway, against the company, which is a corporation created and existing under the laws of the territory and state of Minnesota, and a citizen of that state, to enjoin it from entering into and carrying out a certain agreement between that company and the holders of bonds secured by the second and third general mortgages, and the consolidated mortgages of the Northern Pacific Railroad Company, under which, upon a sale and foreclosure of the mortgages given to secure such bonds, the holders were to purchase or cause to be purchased, the property and franchises of the Northern Pacific Railroad Company."

The Court there held that an arrangement by which a railroad company in return for a guaranty, turns over to a trustee for the entire body of stockholders of another company owning a parallel road one-half of its stock, with an agreement contemplating an interchange of traffic and the use of terminal facilities, and with the almost certainty that the complete control of the former will be obtained by the latter company—is in violation of a law prohibiting railroad corporations from consolidating with, leasing, or purchasing, or in any other way becoming the owner of or controlling, *a parallel or competing line.*

In *Oregon Railway & Navigation Company* vs. *Oregonian Railway Company,* 130 U. S. 1; 32 L. Ed. 837, the Court stated: "It is strenuously argued, and with some degree of plausibility that the language of this proviso and the use of the words *'successors'* and *'assigns'* in other statutes, which are referred to, imply that by the law of Oregon railroad companies may make, and must be supposed to be capable of making, assignments. But whatever may have been the intent in the minds of the legislators in using these words, *it is not precisely the form in which we would expect to find a grant of the power to sell,*

to *lease,* or to *transfer* the title, ownership or *use of railroad* lines, the property belonging thereto, and the franchises necessary to carry them on, by one corporation to another.

"One of the *most important powers* with which a corporation can be invested is the *right to sell out its whole property,* together with the franchises under which it is operated, or the authority to *lease* its property for a long term of years. In the case of a railroad company *these privileges, next* to the *right to build* and operate its railroad, would be the *most important which could be given it,* and this idea would impress itself upon the Legislature. Naturally, we would look for the authority to do these things in some express provision of law. We would suppose that if the Legislature saw fit to confer such rights *it would do so in terms which could not be misunderstood.* To infer, on the contrary, that it either intended to confer them or to recognize that they already existed, by the simple use of the word *'assigns', a very loose and indefinite term,* is a stretch of the power of the contract in making implications which we do not feel to be justified."

(See further quotation under Point 10.)

In *Northern Pacific Railway Company* vs. *Townsend,* 190 U. S. 267; 47 L. Ed. 1044, the Court said: "To repeat, the right of way was given in order that the obligation to the United States, assumed in the acceptance of the act, might be performed. Congress having plainly manifested its intention that the title to, and possession of, the right of way should continue in the original grantee, its successors and assigns, so long as the railroad was maintained." (For further quotation see Point 7.)

In *Louisville Trust Co.* vs. *Louisville N. A. & C. R. Co.,* 174 U. S. 674; 43 L. Ed. 1130, the Court said: "Can it be that when in a court of law the right of an unsecured creditor is judicially determined and that judicial determination carries with it a right superior to that of a mortgagor, the mortgagor and mortgagee can enter into an agreement by which through the form of equitable proceedings all the right of this unsecured creditor may be wiped out, and the interest of both mortgagor and mortgagee in the property preserved and continued? The question carries its own answer. Nothing of the kind can be tolerated." (See further quotation in Appendix, p. 62.)

All the other cases cited and quoted under Point 10 are equally applicable here.

POINT 16.

That neither in 1896 nor at any other time did the railway company have ability, power or authority to receive by deed, lease or other contract, the railroad properties, assets and lands of the Northern Pacific Railroad Company in any of the states traversed by the lines of the said railroad company.

This Point will be considered with assignment of error XVII (see appendix, p. 77).

The decisions cited and quoted under Point 10 and other points sufficiently sustain this point.

That the railway company could not take over a parallel line is because its statute sections 1788 and 1833 and other sections, which prohibit same.

In *Pearsall* vs. *Great Northern Railway Company,* 161 U. S. 846; 40 L. Ed. 383, the Court held that under a Minnesota statute similar to the Wisconsin Act that a Minnesota Railroad company could not take control of the Northern Pacific Railroad Company because the latter was a parallel line.

In *Case* vs. *Kelly,* 133 U. S. 21; 33 L. Ed. 513, the Supreme Court found and determined that a Wisconsin railroad corporation had no authority under the laws of that State to receive an indefinite quantity of lands whether by purchase or by gift for use in the construction with no limitation upon their use or upon their sale, but that such railroad company is limited to the lands necessary to such use as are appropriate to the operation of its railroad, being its right of way, terminals and stations.

The laws construed in *Case* vs. *Kelly* were the *same* ones in effect in 1896 and the Court stated: *"It is not pretended that there is any general statute of the State of Wisconsin which authorizes either this Company or any other corporation to purchase and hold lands indefinitely,* as an individual could do, without regard to the uses to be made of such real estate. The *charter* of the Company, approved April 12, 1866, chapter 540, authorizes it to acquire real estate, namely, the fee simple in lands, tenements and easements, for their legitimate use for railroad purposes. *It is thus authorized* to take lands 100 feet in

width for right of way, and also such as is needed for depot buildings, stopping stages, station houses, freight-houses, warehouses, engine-houses, machine-shops, factories and for purposes connected with the use and management of the railroad. *This enumeration of the purposes* for which the corporation could acquire title to real estate *must necessarily be held exclusive of all other purposes,* and as the court said at the time of making its interlocutory decree, *'it was not authorized by its charter to take lands for speculative or farming purposes'.*

"It must be held, therefore, that there was no authority under the laws of Wisconsin for this corporation *to receive an indefinite quantity of lands,* whether by purchase or gift, *to be converted into money* or held for any *other* purpose *than those mentioned in its Act of incorporation."*

It was contended in this case that the court could not decide the question but it would have to be raised by a writ of *quo warranto,* but the Court held and said: "It has no authority by the Statute to receive such title and to own such lands, and the question here is, not whether the courts would deprive it of such lands if they had been conveyed to it, but whether they will aid it to violate the law and obtain a title which it has no power to hold. We think the questions are very different ones, and that while a *court might hesitate* to declare the title to lands received already, and in the possession and ownership of the Company, void on the principle that they had no authority to take such lands, it is very clear that it will not make itself the active agent in behalf of the Company in violating the law, and enabling the Company to do that which the law forbids."

The Court held that it would assist in taking away from the railroad company rights and property already obtained by *ultra vires* acts in the Oregon Railway & Navigation case above.

Congress knowing of these decisions, by not repudiating them by the terms of the Act of June 25, 1929, made it obligatory on the Courts to read them into this Act as it amended the Act of July 2, 1864.

In the suit at bar the railway company is not only seeking to retain lands to which it claims to have obtained the title from the railroad company, but is also seeking

other lands or the value of same, in which the title is still in the United States and has not passed to either the railroad company or the railway company and title to which the railway company cannot receive, take or hold under the laws of Wisconsin, Minnesota and the other states traversed by the Northern Pacific Railroad Company system.

Case vs. *Kelly* and Oregon Railway Company case are authority that lands can be recovered from a railway company which took same without authority to receive same and that *Quo Warranto* is not necessary or proper: furthermore, the statute of 1929 as indicated by the Report of the Committee gives a specific and special remedy to do so in this suit and makes it mandatory on the Court and the Attorney General to enforce same.

POINT 17.

The Northern Pacific Railway Company, the so-called Wisconsin corporation, was never legally organized, nor became operative under the Wisconsin laws and so far as it illegally proceeded and attempted to organize and issue stock, practically all of its stock was owned by and belonged to the railroad company in 1896 and between 1873 and 1883 the railroad company absorbed and took over the route and unfinished work of the railway company and completed same into Superior, Conner's Point and Rice's Point in its own name and made same part of its system.

This Point will be considered with assignment of error XVII (appendix, p. 77).

A map showing the 3 miles of railroad at Walbridge, built in July, 1896, by the Railway Co.—the only railroad ever built by the Railway Co.—and showing the line built by the Railroad Co. into Superior to Connor's Point and to Rice's Point is in the front of the Appendix.

Much of the history of the Railway Company applicable to this Point is set out in the statement of the case (p. 6 above) and more of the history of the building of the line from Thompson's Junction through Superior to Connor's Point and Rice's Point is set out in the Act

of Congress of February 27, 1873 (17 Stats. 477; set out in Appendix, p. 1), and in *Roberts* vs. *N. P. R. R. Co.*, 158 U. S. at 15, 39 L. Ed., at 878, where the Court said: "There is no room for doubt that the railroad company was legally competent to receive a grant of lands, to enable it to construct and maintain its road. The Northern Pacific Railroad Company was organized under and by virtue of the Act of Congress, approved July 2, 1864, entitled 'An Act Granting Lands to Aid in the Construction of a Railroad and Telegraph Line from Lake Superior to Pugent Sound, on the Pacific coast, by the Northern Route', in which Act it was, among other things, provided that 'the said company is authorized to accept to its own use any grant, donation, power, franchise, aid, or assistance which may be granted to or conferred upon said company by the Congress of the United States, by the legislature of any state, or by any corporation, person, or persons; and said corporation is authorized to hold and enjoy any such grant, donation, loan, power, franchise, aid or assistance, to its own use for the purpose aforesaid'. And by an act of the legislature of the state of Wisconsin, approved April 10, 1865, the company was, for the purposes set forth in said Act of Congress and to carry the same into full effect, vested with all the rights, powers, privileges, and immunities within the limits of the said state of Wisconsin, which were given by said Act of Congress within the territorial jurisdiction of the United States.

In September, 1880, the railroad company, having theretofore constructed its railroad and telegraph line to a point in the state of Minnesota, was about to select the point or points on Lake Superior to which their said line should be extended. In this condition of affairs the authorities of the county of Douglas, desiring to secure extension of the railroad through their territory, and the establishment of a lake terminus within the same, made a proposal to the company to transfer by sufficient deed or deeds to the company all the alienable lands or lots belonging to the county which had been acquired by deed, to which the county had held undisputed title for more than two years, if the company would construct their road upon a route desired by the county and establish a terminus, with sufficient docks, and piers suitable for the transfer of passengers and freight from the railroad cars to and from lake-going craft, within the limits of the county.

"This proposal was accepted by the railroad company, and a contract to that effect was entered into between the parties, and, in pursuance thereof, the railroad company, during the year 1881, *constructed and equipped its line of railroad upon the route selected by the county,* and built the docks and piers and other structures *called for by the contract,* expending in so doing the sum of about $740,000. *On January 16, 1882, the county board by a resolution,* reciting that the railroad company had complied with the terms of the contract and had performed its part thereof, authorized the execution of the proper deeds; and thereupon a deed was executed and delivered to the railroad company, conveying, among other lands, those in dispute. This deed, was, on the same day, duly recorded in the office of the Register of deeds of Douglas county. Ever since the company has maintained and operated its road and wharves, and has paid and the county has received annual taxes, amounting to about five thousand dollars." (This Resolution is in Appendix, p. 7.)

"By an Act, approved *March 23, 1883,* the legislature of the state of Wisconsin enacted as follows: 'Any conveyance heretofore made by the county of Douglas to the Northern Pacific Railroad, under and in pursuance and satisfaction of resolutions of the county board of said county, dated September 7, 1880, is hereby declared to be valid and effectual to vest in the Northern Pacific Railroad Company the title to the lands conveyed or attempted to be conveyed by such conveyance; and any assignment of tax certificates heretofore made to the said railroad company, upon the property, or any thereof, embraced in or conveyed by said conveyance, pursuant to and in satisfaction of and in compliance with said resolutions, is hereby declared to be valid.' (Section 2 of this Act is in the Appendix, p. 9.)

Thereafter the railroad company sold and conveyed, for value, portions of these lands to third parties."

* * * * *

"There is a second important feature that distinguishes this case from those relied on by the plaintiffs in error, and that is the character of the railroad company, as a corporation created for public and national purposes. The Wisconsin courts were dealing with corporations of their own state, and they *went upon the proposition* that the *construction* and *maintenance of railroads did not constitute a public purpose, because* the corporations created

to build and run railroads *were strictly private corporations formed for the purpose of private gain.* If the making and maintaining a railroad in Wisconsin by a state corporation was not a public use, it was thought to follow that such an enterprise could not receive municipal aid. *And it may be conceded that, when we are called upon to pass upon the legal rights of a Wisconsin railroad company, we should follow the law laid down by the state courts.* But the *question now* arises *whether* such a proposition is *applicable to the case of a corporation created by a law of the United States, and subjected by its charter to important public duties.*"

* * * * *

"By an Act approved April 10, 1865, the legislature of the state of Wisconsin declared that, *for the purposes set forth in said Act of Congress, and to carry the same into full effect, the Northern Pacific Railroad Company was vested with all the rights, powers, privileges, and immunities within the limits of the state of Wisconsin* which were *given by said Act of Congress.* (This Act and the amendment thereof of March 10, 1870, and March 25, 1872, are in Appendix, pp. 4 and (A).)

"It is obvious that the effect of this legislation of Congress was to grant the power to construct and maintain a public highway for the use of the people of the United States, and *subject, in important respects, to the control of Congress.* That portion of its road that lies within the state of Wisconsin is of the same public character as the portions lying in other states or territories. Whatever respect may be due to *decisions* of the courts of *Wisconsin defining the character and powers of Wisconsin corporations* owning railroads, the scope of those decisions *cannot be deemed to include* the *case* of a *nation highway like that of the Northern Pacific Railroad Company.* All of the great transcontinental railroads were constructed, under Federal authority, through territories which have since become states. Such states are possessed of the same powers of sovereignty as belong to the older states. *Hence, if the contention were true that the state of Wisconsin, through its judiciary, can deprive that portion of the railroad within its borders of its national character, and declare the Northern Pacific Railroad Company to be a private corporation* not engaged in promoting a *public purpose* the same would be true of the other states through which the road passes. *Such a contention,* we think, *cannot be successfully maintained.*"

The decision in *Williams* vs. *Southern New Jersey R. R. Co.,* 26 N. J. Equity 398, is ample authority that the conduct of the parties here was sufficient to work a consolidation even though no formal agreement of consolidation was recorded with the State authorities. *Cox* vs. *Midland Railroad Company,* 31 N. J. Equity 105, held a railroad company may lose its location by allowing another railroad to use and occupy the land included in such location.

N. P. R. R. Co. vs. *Smith,* 171 U. S. 261; 43 L. Ed. 1047, quoted cases including Roberts case above to the effect that where a railroad company builds its line on route of another railroad or land of others without objections that the building railroad thereby takes title to such land or route.

POINT 18.

The so-called Amendments of the Charter of the Railway Company in 1895, 1896 and 1897 and so-called Acts of the Wisconsin Legislature in those years and later ones seeking to bolster up the Railway Company indirectly where it could not do so directly, are each and all unconstitutional, null and void, and are also invalid and of no effect against the rights of the Railroad Company; and appellants under the Constitution and Statutes of the United States and decisions of the Supreme Court of the United States.

This Point will be considered with assignment of error XVII (Appendix, p. 77).

The railroad company was the owner of and there was outstanding in its name 3,800 shares of the 3,844 shares of outstanding stock of the railway company at the meeting of August 31, 1880, and the 3,800 shares were voted and 12 other shares were voted, the other 32 not being voted.

At the meetings of October 16, 1895 (claiming to ratify the amendment of April 15, 1895), and July 1, 1896, the *3,800 shares* of the stock of the railway company belonging to the railroad company were in the custody and possession of John C. Spooner, who took part in said meetings, who was attorney for the said railroad company and

for the receiver of the said railroad company, and who had received the 3,800 shares of stock as such attorney from the First National Bank of Madison, Wisconsin, on May 23, 1895, for and on behalf of the said railroad company.

The remaining 44 shares of stock of the Superior and St. Croix Railroad Company, which was afterwards changed to the Northern Pacific Railway Company, was bought up by officers and officials of the railroad company through Hiram Hayes, attorney for the railroad company with its funds and for its benefit and at the said so-called stockholders' meeting of the railway company of October 16, 1895, and July 1, 1896, the railroad company was the owner of all of the stock of the said railway company, and at such meeting officers and officials of the railroad company were elected officers and officials of the railway company: all of the stock voted at said meetings was voted by Spooner, his secretary, Reed, and his partner, Sanborn.

The foregoing action of the officials of the railroad and railway companies in voting the stock of the railway company, which was owned by the railroad company, was illegal, unlawful and condemned by the principles decided in the case of *Wardell* vs. *Union Pacific Railroad Company,* 103 U. S. 651; 26 L. Ed. 509.

The *amended Wisconsin Constitution* of 1871 provides: "The Legislature is prohibited from enacting any *special* or *private* laws in the following cases:

* * * * *

7th. For granting corporate *powers* or *privileges* except for cities."

This Constitution doesn't just prohibit amendment of charters but prohibits all "special or private" "corporate powers or privileges", using the word "or" twice, thus disjoining "special" and "private" and also "powers" and "privileges". Authority permitting stockolders to increase the railway company stock from $5,000,000 to any amount without limit and they increased it to $155,000,000 was a "corporate power" granted and not just a "privi-

lege'' as *Chicago City Ry. Co.* vs. *Atherton,* 18 Wall. 233; 21 L. Ed. 902, determined that an increase of capital is *''organic and fundamental''.*

The original charter of March 15, 1870, only authorized the building of a railroad from a point on the west shore of the Bay of Superior or the south shore of the Bay of St. Louis in Douglas County, Wisconsin, through several other counties, ''to such a point'' on the Minnesota boundary north of the Nemadji River as might be deemed advisable, which was purely an intrastate road. The so-called amendment of April 15, 1895, authorized the building of a road not only as set out in the orignal charter, but to build it to points in Michigan and on to the Pacific Coast and to St. Paul, Minnesota, and Chicago, Illinois, thus making it an interstate railroad.

This was such an increase of the powers, rights and functions as were forbidden by the Constitution and denounced by the Supreme Court of Wisconsin in the case of *Black River Improvement Company* vs. *Halway,* 87 Wis. 584; 59 N. W. 126.

The amending act of April 4, 1895, added Sections 14, 15 and 16 to the charter as follows:

''Sec. 14. The said company shall, *in addition to the special powers,* conferred upon it *by said Chapter 326, and by this act,* have, possess, and enjoy all of the rights, powers, privileges, and immunities conferred upon railroad corporations by Chapter 87, of the Revised Statutes of 1878, and the acts amendatory thereof and supplementary thereto, and shall be subject, save where inconsistent herewith, to the restrictions, duties and liabilities imposed upon railroad corporations by said chapter, and all amendatory and supplementary acts.

''Sec. 15. Sections 13, 14, 15, 16, 17, 18 and 19 of said chapter 326 are hereby repealed.

''Sec. 16. All acts and parts of acts inconsistent with, or in any manner contravening, the provisions of this act are hereby repealed.''

Section 14 by its own terms recognizes and states that the *amendment* granted *''special powers''* in addition to the *''special powers''* in the *Charter.*

These amendments granted, as the Court in the Mylrea case stated, "The increased or added rights, powers and franchises", which are unconstitutional, invalid and void; such increase or added powers cannot be granted as an amendment to a charter by special act of the legislature, as determined by the Supreme Court of Wisconsin in *Black River Improvement Company* vs. *Halway,* 87 Wis. 584; 59 N. W. 126, which held that the Constitution of 1871 limited the power to amend to extend the life of the corporation but there could not be an amendment which increased the rights and powers of the corporation.

This 1895 Amendment was such an increase of the powers, rights and functions forbiddon by the Constitution and contrary to the decision in *Black River Improvement Company* vs. *Holway,* 87 Wis. 584; 59 N. W. 126.

At a meeting of the stockholders of the Superior and St. Croix Railroad Company, held July 1, 1896, a resolution was passed as follows:

"RESOLVED, That the corporate name of this corporation be, and the same is hereby, changed from 'The Superior and St. Croix Railroad Company' to 'Northern Pacific Railway Company' which latter name is hereby adopted as the corporate name of this corporation."

There was no authority in the amendment for this change of name.

After the above amendment of the legislature of April 15, 1895, the question arising as to whether or not the corporation was not dead and abandoned for non user and the amendment for that reason was invalid, the Superior and St. Croix Railroad Company had the Attorney General of Wisconsin file a friendly petition for a writ of *quo warranto* to see whether or not the charter had been lost by abandonment, non user and failure to have meetings and whether or not it could be amended by a special act, as the Constitution had been changed forbidding the incorporation of companies by special act. The petition was heard and decided by the Supreme Court in the case of *Mylrea, Attorney General,* vs. *Superior and St. Croix Railroad Company,* 93 Wis. 604; 67 N. W. 1138, in which the

Court held on June 19, 1896, that the charter had not been abandoned by a failure to hold meetings or to carry on any work. The Court specifically refused to pass on the question of whether or not the amendment was not *ultra vires* and invalid and implications from its languages are that the Court thought that the amendment of 1895 was invalid and *ultra vires* because of the increased or added rights, powers and franchises, for the Court stated: "As to the increased or added rights, powers, and franchises under Chapter 244 (1895), the information does not allege that the defendant has used or exercised any of them. There is nothing to show that the company has done any act that it might not lawfully have done under its original charter. The information is the foundation of the jurisdiction of the court, and it cannot be aided by the very general and uncertain statement filed by the defendant that it 'is exercising and intends to exercise, the privileges, rights and franchises conferred upon it * * * by the amendatory act of 1895, and to acquire, by purchase, construction and otherwise, the railroads and genral routes designated in that act, and to operate the same within and without the state, and to issue its stock and bonds thereon, as authorized by said act'. An information in the nature of *quo warranto* cannot be maintained against a corporation from what it may intend or threaten to do. This information does not present any actual practical question in these respects for the judgment of the court, and no judgment of exclusion could possibly be framed upon such allegations. For these reasons, the *court cannot* consider them, or *enter upon the question* of the *validity of the act of 1895,* referred to. The motion for leave to file an information and for process is denied."

Union Trust Co. vs. *Bennett, et al.,* 169 Ind. 346, 82 N. E. 782. By act of 1832 company was allowed a capital stock issue of $100,000. An act of 1873 which amended the 1832 act and provided that the capital stock could be increased by additional sums from time to time as may be determined by a vote of the majority in value of stockholders. Court held that the General Assembly should not be empowered, under the State Constitution, by a special law, to alter an existing charter in such a manner as, *in effect, to make a new corporation;* and that the undertaking

of a subscriber under this act, is a *nudum pactum.* The change in the amount of a corporation's capital stock is a fundamental change and not authorized without legislative authority.

Court also held that in an action by a receiver of an insurance company for subscriptions on unpaid stock, evidence required a finding that the subscription was for stock issued under an unconstitutional statute, and not for the valid stock which the corporation was originally authorized to issue.

In *Marion Trust Co.* vs. *Bennett,* 82 N. E. Rep. 782, the Court held and said: "A *change* in the *amount of the capital* stock of a corporation, like a change in the objects thereof, *is fundamental,* and *cannot* be *made without clear legislative authority. Railway Co.* vs. *Allerton,* 18 Wall. (U. S.) 233, 21 L. Ed. 902; *McNulta* vs. *Cornbelt Bank,* 164 Ill. 427, 45 N. E. 954, 56 Am. St. Rep. 204; Note to *Peck* vs. *Elliott,* as reported in 38 L. R. A. 616; Clark on Corporations (2d Ed.) 346. What, then, shall be said of a special act *which attempts to change a corporation of limited capital stock to one in which the whole matter of the extent of the capital stock is left to the stockholders?* It is clear, in our opinion, since the corporation in question was limited to $100,000 capital by the act of its creation, that the provision of the act of 1873, whereby there was attempted to be conferred upon the association the capacity of infinite growth, *so that it might bulk with the largest of corporations, was unconstitutional* and void, as an attempt to create an insurance corporation by special act. The undertaking of a subscriber to the capital stock of a corporation must find a correlative in the capacity of the corporation, if it be a going concern, to deliver such stock, and, if the association be without capacity in that behalf, the undertaking of a subscriber is a *nudum pactum.*"

In *Chicago City Railway Co.* vs. *Allerton,* 85 U. S. 233, 21 L. Ed. 902, the Court held and said: "The decree must be affirmed on the broad ground that a *change so organic* and *fundamental as* that of *increasing* the *capital stock* of a corporation beyond the limit fixed by the charter cannot be made by the directors alone, unless expressly authorized thereto."

Scoville vs. *Thayer,* 105 U. S. 143, 148, 26 L. Ed. 968.

Bank vs. *R. R.,* 13 N. Y. 599.

Neither the railroad company nor its property or stock could be taken, received or held by the railway company without the consent of the United States, even if the railway company had authority to so take, hold and receive it, which latter authority is denied.

The title to this railroad, telegraph line and land grant is now claimed by the Northern Pacific *Railway* Company, a *Wisconsin* corporation, incorporated in 1870 to build a local line of railroad entirely and solely within Wisconsin.

Under the Wisconsin law and decisions railroad corporations chartered in that State are deemed strictly private and local corporations, formed for purposes of private gain.

The distinction between such Wisconsin corporations and the Northern Pacific *Railroad* Company and the facts both are determined and found by the Court in *Roberts* vs. *Northern Pacific R. R. Co.,* 158 U. S. 1; 39 L. Ed. 873 (April 22, 1895), where, after quoting from the Congressional Charter Act of 1864 as to the declared public purposes for which the latter corporation had been created, the U. S. Supreme Court said: "It is obvious that the effect of this elgislation of Congress was to grant the power to construct and maintain a public highway for the use of the people of the United States, *and subject, in important respects, to the control of Congress.* That portion of its road that lies within the State of Wisconsin is of the same public character as the portions lying in other States or Territories. Whatever respect may be due to decisions of the Courts of Wisconsin defining the character and powers of Wisconsin corporations owning railroads, the scope of those decisons cannot be deemed to include the case of a national highway like that of the Northern Pacific Railroad Company. All of the great transcontinental railroads were constructed, under Federal authority, through Territories which have since become States. Such States are possessed of the same powers of sovereignty as belong to the older States. Hence, if the contention were true that the State of Wisconsin, through its judiciary, can deprive that portion of the railroad within its borders to its national character, and declare the

Northern Pacific Railroad Company to be a private corporation not engaged in promoting a public purpose, the same would be true of the other States through which the road passes. Such a contention, we think, cannot be successfully maintained. * * * We think, therefore, that when the Circuit Court of the United States for the District of Wisconsin was called upon, in the present case, to pass upon the character, powers and rights of the Northern Pacific Railroad Company, it was bound to regard that company as a corporation of the United States created for national purposes, and as a means of interstate commerce and not to apply to it the views of the Wisconsin Courts pertaining to their local railroads.

"Upon the principle of these cases it is obvious that the *state of Wisconsin* at least after it had given its consent to the Northern Pacific Railroad Company to enter into its territory and construct its road, and such consent had been acted on, *could not by hostile legislation, hamper and restrict that company in the management and control of its railroad, nor by judicial decisions of its courts transform a corporation formed by national* legislation for national purposes and interstate commerce into one of local character, with rights and powers restricted by views of policy applicable to state organizations."

John C. *Spooner* was *attorney* for the railroad company in this case.

There was no authority in the Act of Congress of 1864 for the transfer of the properties or the stock of the railroad company as it was transferred and juggled in 1896 nor was there any authority in the Act of Wisconsin for the railroad company to take and receive same. The invalid and illegal amendment of the charter of the railway company of April 15, 1895, did not empower or authorize the railway company to take or receive same—this amendment was approximately six months before there was any authority for the amendment to be sought or obtained, as there was no meeting of the railway company from August 31, 1880, until October 10, 1895, which latter meeting was illegal and void.

Any contention that the deposits were on the railway company stock is contrary to the Wisconsin statute, Section 1751, in force in 1896 which provided as follows:

"No corporation shall issue any stock or certificate of stock except in consideration of money, or labor or property estimated at its true money value, actually received by it equal to the par value thereof," etc.

On April 18, 1899, on appeal of those interested in sustaining the reorganization for the Northern Pacific Railway Company this Section 1751 was amended by adding thereto this proviso, which is null and void as *attempting indirectly to amend* the railway company *charter* to give powers which could not under the Constitution be done directly:

"Provided that nothing in this section contained shall apply to any issues of stock or of bonds heretofore or hereafter made by any railroad corporation in accordance with any plan of reorganization adopted by the holders of the greater amount of the bonds, or of the stock of any insolvent railroad corporation whose railroad wholly or partly within this state, has been sold or hereafter shall be sold at mortgage sale, or in bankruptcy or at other judicial sale and acquired by the railroad corporation making such new issue of stock or of bonds or of both; and any and all such issues heretofore made in conformity with any such plan of reorganization are hereby legalized, ratified and confirmed."

A void and unconstitutional amendment of Section 1788 of the revised statutes of Wisconsin relative to reorganization of corporations was likewise obtained by the same parties on April 18, 1899; the Act is in Appendix, p. 41.

This void amendment seemingly fails to authorize the purchase of property or stock of a foreign or Federal Corporation, as it seems limited to corporations exsiting under laws of Wisconsin as it does not mention corporations of other States, but does mention property located in other States, and the amendment is prohibited from applying to or affecting the railroad company by *Roberts* vs. *Northern Pacific Railroad Company,* 158 U. S. 1; 39 L. Ed. 873.

Mentioning in the act corporations of Wisconsin, and not mentioning corporations of other states or Federal Corporations, or foreign corporations excludes all but Wisconsin corporations under the well known maxim that naming one excludes the other; furthermore permitting

purchase of railroad property in other states without stating it may belong to a corporation of other states, likewise excludes the purchase of such property when owned by a corporation of another state.

The railroad company was not insolvent as its officials were paid in stocks and securities $203 per share of par value of $100, and it was agreed that this $345,000,000 was the actual value of the railroad properties sold; the statute is limited to purchase of property of *insolvent railroad corporations;* the allegations in the bill in the Winston suit were that the property at a sale would bring more than the debts and stock—of course it meant a fair sale and not the fraudulent collusive so-called sale that officials went through with.

The act as in effect in 1896 and as amended forbids any such arrangement between companies whose *lines are parallel,* and the only line the Railway Co. had was the three miles built between July 1 and 12, 1896, not parallel to, but actually on the right of way of the railroad company at Walbridge (R., ...).

This act is unconstitutional under Art. 4, Sect. 31, Subd. 7 of the Wisconsin Constitution as granting powers by special act, and this was as alleged a special act for a special corporation, the railway company.

It is also unconstitutional under Art. 4, Sect. 18, of said Constitution as it embraces more than two subjects in one act, and the subjects are not expressed in the title of the act.

The Reorganization Managers, Syndicate Members, officials and directors of the railroad and railway companies and others associated with them in their schemes and plans known as the Reorganization Proceedings and fake foreclosure of 1896, which were conducted for their own personal profit, benefit and aggrandizement, having difficulty with the titles and being advised of the defects and lack of legislative authority in the said proceedings, sought and secured an amendment April 22, 1897, and another amendment April 4, 1899, of Section 1833 of Wis-

consin laws by the Legislature of Wisconsin, which acts in effect were, and were intended to be, amendments of the charter of the railway company and an increase of its powers and rights and to apply only to the railway company. They were and are absolutely null and void and in contravention of the Constitution of Wisconsin and in contravention of the principles declared binding on and as to the railroad company in *Roberts* vs. *Northern Pacific Railroad Company,* 158 U. S. 1; 39 L. Ed. 873.

The said act set out in full in the appendix (page 38) shows clearly that it is in violation of Article 4, Section 18 of the Constitution because it is a private and local act passed especially for the railway company and, as alleged, was an indirect effort to amend the charter of the railway company to give it all the rights of the railroad company, and it has more than two subjects and none of the subjects are given in the title. The very attempt to give a corporation all the power of another corporation, from which it takes a conveyance or lease is clearly an amendment of the charter powers of the purchasing corporation and is invalid under Article 4, Section 31, Subd. 7, of the Wisconsin Constitution above (R., 1131).

It will be noted that such purchase is prohibited by parallel roads and the act also requires that there must be a connecting continuous main line, which makes it inapplicable here as the only line the railway company owned at the time of the so-called reorganization was the three miles built at Walbridge on the right of way of the railroad company and parallel to it and in no way a connecting line, and if it hauled any freight or passengers, it would be a competing line for the three miles.

The railway in its effort to try to make the 1896 so-called proceedings and foreclosure hold water obtained an invalid amendment of Section 1833 on April 22, 1897, Chapter 294, but finding that it would not protect them, they sought and obtained the invalid amendment of April 18, 1899.

The last provision of Section 1 in the above Act—against parallel lines—was in Section 1833 in 1896.

On July 1, 1896, the railway company did not own or was not operating any railroad, but between July 1st and its reorganization agreement of July 13, 1896, and the foreclosure on July 25, 1896, the railway company built the *three mile line described* below from the Minnesota State line east into and through the town of Walbridge, which was parallel to the railroad's track and on the right of way and land of the railroad company.

Appellants are advised by Wisconsin attorneys and it seems clear that the Wisconsin Acts of 1897 and 1899 amending Sections 1751, 1788 and 1833, are invalid and void as contrary to the Wisconsin Constitution, Article 4, Section 18, which forbids any private or local act containing two subjects and they must be set out in the title of the Act.

The Wisconsin Constitution, Article 4, Section 18, is as follows: Private and Local bills. Sec. 18. No private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title (R., 1129).

An act which provided that escheats in Milwaukee County should go to the county, and later an amendment providing that said escheats go to the Milwaukee County Orphans Board was a local act, and the purpose of the act not being expressed in the title, the act was void. It is limited in its effect to a single county. It is, therefore, local in character and this brings it within the preview of the constitutional provisions. Estate of Bulemicy, 212 Wis. 426, 249 N. W. 534.

Chapter 257, Laws of 1933, entitled, "An act to amend sub-section 1 of Section 15 of Chap. 549, Laws of 1909, as amended by Chapter 300, Laws of 1929, relating to the civil court for Milwaukee County", purporting to transform such court from a municipal court into an inferior court, by providing that its summons may be served in any county of the state, is invalid because the subject of

the bill was not expressed in the title. *State ex rel. Schenider* vs. *Midland I. & F. Corp.,* 219 Wis. 161, 262 N. W. 711.

Act entitled as an act to amend act relating to distribution of taxes, which amendatory act applied only to counties of over 500,000 population and hence applied only to Milwaukee County, held unconstitutional for failure to express subject of act in title, since act was local, in that special charter of Milwaukee County included in classification created a situation which made passage of act necessary, which could not exist in any other county. *Whitefish Boy* vs. *Milwaukee County,* 271 N. W. 416.

POINT 19.

All so-called 1896 proceedings and agreements are void because of the infidelity of directors and officials of both the Railroad Company and Railway Company.

The directors of the Railroad Co. were directors of the Railway Co. and as set out in Statement of the Case reaped a fortune as members of the Syndicate and otherwise at the expense of stockholders of Railroad Co. by this fraud and deceit.

In *Geddes* vs. *Anaconda Copper Mining Co.,* 254 U. S. 590, 65 L. Ed. 425, 432, reversing 245, Fed. 225—(C. C. A.—9), the court held and said:

"The relation of directors to corporations is of such a fiduciary nature that transactions between boards havcommon members are regarded as jealously by the law as are personal dealings between a director and his corporation; and where the fairness of such transaction is challenged, the burden is upon those who would maintain them to show their entire fairness; and where a sale is involved, the full adequacy of the consideration. Especially is this true where a common director is dominating in influence or in character. This court has been consistently emphatic in the application of this rule, which, it has declared, is *founded in soundest morality,* and *we now add, in the sound-*

est business policy. Twin-Lick Oil Co. vs. *Marbury,* 91 U. S. 587, 588, 23 L. Ed 329, 330, 3 Mor. Min. Rep. 688; *Thomas* vs. *Brownville, Ft. K. & P. R. Co.,* 109 U. S. 522, 27 L. Ed. 1018, 3 Sup. Ct. Rep. 315; *Wardell* vs. *Union P. R. Co.,* 103 U. S. 651, 658, 26 L. Ed. 509, 511, 7 Mor. Min. Rep. 144; *Corsicana Nat. Bank* vs. *Johnson,* 251 U. S. 68, 90, 64 L. Ed. 141, 155, 40 Sup. Ct. Rep. 82.

Jackson vs. *Ludeling,* reported in 88 U. S. 616, 22 L. Ed. 492, 495, is a clear ruling *on infidelity of directors of* Railroad corporation in which facts and acts of directors are somewhat as in the case at bar, to-wit:

"Their bill is filed as well for themselves as for all other bondholders whose situation is similar to theirs. *Some of them are also preferred* stockholders of the Company to a large amount. The mortgage was made by an authentic Act on the first day of September, A. D., 1857, to John Ray or bearer, to secure the full, faithful and punctual payment and redemption of each and all the bonds issued under it to any and all the future holders thereof, and to each and every one of them when the same should become due and payable, together with the interest accruing thereon. The *relief* sought by the bill is, that the *mortgage* may *be declared* to be a *valid lien* upon all the property described therein; *that* a *sale* averred to have been *made under it in 1866* to the defendant Ludeling and his associates may *be set aside,* and the *deed* made to them by the Sheriff may *be declared* to be *fraudulent and void,* that the defendants may be enjoined against setting up any title under the sale in the deed prohibited from selling any of the property, rights and privileges of the Railroad Company, and required to account for all money received by them on account of the corporation, and that mortgaged property may be decreed to be sold for the benefit of the bondholders, the preferred and other stockholders. The bill also prays for the appointment of a receiver and for other relief.

* * * * * *

And the situation of the other defendants is little if any better. John Ray, Joseph F. McGuire, John C. Mc-

Guire, Christopher H. Dabbs, Wesley J. Q. Baker, Robert Ray and Henry M. Bry were directors of the Railroad Company when the executory process was sued out, and when the sale was made. Bry was the vice-president and acting president, in consequence of the absence of the president, who was in Georgia. Joseph McGuire was the Company's secretary and treasurer. All these parties were at hand, residents in or near Monroe. As officers of the Company they had the custody and charge of the railroad and all the property of the corporation. And they held it in a very legitimate sense as trustees. Certainly they were the *trustees of the stockholders,* and also, to a considerable degree, of the *bondholders,* owners of the mortgage. We do not say they might not have purchased the property at a sale over which they had no control, and made under judicial process adverse to the Company. Perhaps they might. But we do say they had no right to join hands with Gordon. They had no right to enter or participate in a combination, the object of which was to devest the Company of its property and obtain it for themselves at a sacrifice, or at the lowest price possible. *They had no right to see their own profit at the expense* of the Company, *its stockholders, or* even its bondholders. Such a course was forbidden by their relation to the Company. It was their duty, to the extent of their power to secure for all those whose interests were in their charge the *highest possibly price for* the *property which could be obtained* for it at the *Sheriff's sale.* They could not rightfully place themselves in a position in which their interests became adverse to those of either the *stockholders* or bondholders. And this rule was peculiarly applicable to these defendants. On the 11th of October, 1865, only about two and a half months before Gordon instituted his proceedings to effect a sale of the road, the directors had resolved that, "In pursuance of resolutions passed by a meeting of the stockholders held on October 2d, the president of the Company be appointed to make arrangements with any company who, in his judgment, might be able to put the road in repair, which was theretofore in

operation, and complete the balance of the road, 'and pay the debts of the company;' and, if such arrangements could be made, that the same be reported to the directors, and upon their approval, that such steps should be taken as might vest the road, its franchises and other property in such Company.'' One of the purposes of this resolution was the payment of the debts of the Company. How, then, can it be claimed that directors who had thus resolved, in obedience to the instructions of the stockholders, were at liberty to participate in a *scheme,* the object and effect of which was to devest the Company of all its property and franchises without the payment of its debts? How can they be permitted to join hands with those who sought to obtain that property at the lowest price, *whose interest it was to have no other bidders than themselves at the sale,* and *whose action tended to defeat the avowed object of the resolution passed by the directors, as well as to make worthless the security which it was their duty to protect* and render in the highest possibile degree fruitful?

* * * * * *

A sale may have ben conducted legally in all its process and forms, and yet the purchaser may have been guilty of fraud, or may hold the property *as a trustee.* In this case the complainants rely upon no irregularity of proceeding, upon no absence of form. The forms of law were scrupulously observed. But they rely upon *faithlessness to trusts* and common obligations, upon combinations against the policy of the law and fraudulent, and upon confederate and successful efforts to deprive them wrongfully of property in which they had a large interest, for the benefit of persons in whom they had a right to place confidence. Homologation is no obstacle to such a claim.

In *Farmers Loan and Trust Co.* vs. *N. Y. and N. Railway Company, et al.,* 44 N. E. 1043, 150 N. Y. 410, the Court held that where a railroad corporation purchases a majority of the stock of another corporation for the purpose of controlling its property, equity will not lend its aid to such stockholder by enforcing a mortgage and decreeing a fore-

closure against the property of the corporation at the request of such stockholder, and to the manifest injury of the minority stockholders, and the destruction of their interests in the corporation.

This plaintiff is the same Trust Company as was plaintiff in the Northern Pacific so-called foreclosure.

The Court said at page 1047:

"In *Gamble* vs. *Water Co.,* 123 N. Y. 91, 25 N. E. 201, in discussing a similar question, Judge Peckham, in effect, said that, although it is not every question of mere administration or of policy upon which there might be a difference of opinion that would justify a minority in coming into a court of equity to obtain relief, yet, when the action of a majority of the stockholders of a corporation is fraudulent or oppressive to the minority shareholders an action may be maintained by the latter, where the contemplated action of the majority is so far opposed to the interests of the corporation as to lead to a clear inference that such action is to serve some outside purpose, regardless of the consequences to the company and inconsistent with its interests.

In *Ponder* vs. *Railroad Company,* 72 Hun. 385, 389, 25 N. Y. Supp. 560, where the Erie Railroad Company, through the action of the Buffalo, Bradford and Pittsburgh Railroad Company, whose directors were elected and controlled by the Erie Company, without consideration, obtained the property of the latter corporation and so arranged its affairs as to render all the shares of its stock other than those held by the Erie Company valueless, it was held that a stockholder of the Buffalo, Bradford and Pittsburgh Railroad Company might maintain an action to redress the wrong done to his company. In that case Mr. Justice Follett said: 'This was a fraud on the Buffalo, Bradford and Pittsburgh Railroad Company and its shareholders. Such frauds are not uncommon in the management of corporations, and, when they are exposed, should be condemned by the Courts, and a heavy hand laid upon all who participate in them.'

In *Barr* vs. *Railroad Company,* 96 N. Y. 444, where the officers of another corporation had leased the property of the first corporation, controlled a majority of its stock and *conspired to compel* the *minority to sell its stock by refusing to pay the rent due,* it was held that a court of equity on the application of the minority, would compel the payment of the rent; and that where the majority of the stockholders of a corporation are illegally pursuing a course which is in violation of the rights of other stockholders, an action to obtain equitable relief may be maintained by an aggrieved stockholder.

Sage vs. *Culver,* 147 N. Y. 241, 41 N. E. 513, is to the effect that, when it can be fairly gathered that the officers and directors of a corporation have made use of relations of trust and confidence to secure or promote some selfish interest, it is enough to set a court of equity in motion, and to require them to explain such a transaction which there is presumption against in equity.

In *Meyer* vs. *Railway Company,* 7 N. Y. St. Rep. 245, it was held, that a *majority of the stockholders* of a corporation would *not be permitted* to *sanction* a *transaction* which is the *outcome* of a *scheme dishonest* or *fraudulent* in its *inception,* and that the *minority stockholders* have *rights* which under such circumstances *must be recognized;* but the majority may legally control the company's business, but in assuming such control they take upon themselves the correllative duty of diligence and good faith; and they cannot manipulate the company's business in their own interests to the injury of the minority stockholders.

In *Ervin* vs. *Navigation Co.,* 27 Fed. 630, it was held that when a number of stockholders combine to constitute themselves a majority to control the corporation as they see fit, they become for all practical purposes the corporation itself, and *assume the trust relation* of the corporation toward its stockholders; and if they seek to make profit out of it, at the expense of those whose rights are the same as their own, they are unfaithful to the relation they have assumed, and guilty, at least, of constructive fraud, which a court of equity will remedy."

POINT 20.

The mortgage and bonds executed and issued on July 1, 1870, by the railroad company under the Joint Resolution were never foreclosed or released and are still in force and effect and held as security for the preferred stock of the appellants and others. All the mortgages and bonds subsequent to July 1, 1870, purported to have been executed and issued by the railroad company are in violation of the Act of July 2, 1864, and were and are absolutely null and void and the trustees and holders took the same with knowledge that they were so unauthorized, null and void and not binding obligations of the railroad company, nor liens on any of its properties and lands.

POINT 21.

The preferred stock of the railroad company owned by appellants is a debt, secured by equitable lien on lands and otherwise as well as a stock and as to it the 1896 so-called reorganization and foreclosure are void under the principles of the Boyd case and others.

POINT 22.

The so-called foreclosure proceedings of 1875 were in no wise a foreclosure of the mortgage of July 1, 1870. The same was not foreclosed, no title ever passed to the properties of the railroad company and the so-called foreclosure proceedings were merely an exchange of securities. While the officials of the railroad company and the railway company for practically fifty years persistently pleaded in Court and contended before Congress that there was a valid foreclosure and passing of title in 1875 and issued numerous mortgages relying on the validity of said so-called foreclosure yet in 1924 and 1925 they abandoned such contentions and admitted there was merely an exchange of securities and not a foreclosure or passing of title; Congress was not satisfied with this admission by the railway company but required a finding of fact and determination thereof by the Courts.

Points 20, 21 and 22 will be considered with assignment of error IV (appendix, p. 72).

The purchasers and Mortgagees in 1896 at the so-called foreclosure and exchange of stock took possession with notice that there was no foreclosure in 1875 and that the

1870 mortgage was still an effective lien on the property. *Simmons Coal Co.* vs. *Doran,* 142 U. S. 417; 35 L. Ed. 1063, quoted under Point 13 above.

The 7.3% bonds under the mortgage of July 1, 1873 are still alive and there has been no foreclosure, payment, satisfaction, or release of same, and they are still security for the preferred stock (R., 986). It seems that the bonds were taken up with the preferred stock and deposited with the trust company in New York and are further security for the preferred stock. The railway company carried the bonds in its balance sheet of September 28, 1876, and its report of June 30, 1898, as assets (R., 1100).

There was a provision that the preferred stock was to be paid off by the sale of certain lands (R., 987), and a great deal of the preferred stock was paid in that manner and from the history of the preferred stock as set out in the statement of the case and in the papers referred to it seems evident that the preferred stock was an equitable lien on the said lands as well as on the 7.3% bonds; the bonds were taken up in exchange for the preferred stock and as long as there were no foreclosure or release the preferred stockholders can claim an equitable line on same.

Preferred stock is an evidence of debt with a voting right when so authorized between the preferred and common stockholders and such authorization is permissable just like bonds at certain times obtain voting rights.

Preferred stock has been recognized as certificate of indebtedness in some cases. *Williams* vs. *Parker,* 136 Mass. 204; *Burt* vs. *Rattle,* 31 Ohio St. 116.

The attempt in the so-called Plan of 1896 to cut out or assess the preferred stock voids the Plan and also the so-called foreclosure of 1896 under the Boyd case which is now *res judicata* as to the Railway Company.

Provisions in the preferred stock and mortgage that the preferred stock be redeemed by sales of land is conclusive proof it is a debt.

POINT 23.

The Demurrer to paragraph 18 of the Amended Bill was properly sustained, but it should have been sustained to the entire Amended Bill because of the allegation of said paragraph 18, and other allegations in the Amended Bill; likewise appellant's motion to dismiss Amended Bill should have been granted.

This Point will be considered with assignment of error XIX (appendix, p. 78).

A demurrer opens the entire record and he who first files an insufficient pleading will be cast.

The Amended Bill, paragraph 18 (R., 51), alleges that the properties of the Railroad Co. "passed into possession and control" of the Railway Co., which "did exercise complete ownership" of same.

There are no allegations denying or raising the question of the validity of the mortgages, foreclosure or plan, or other contentions before the Joint Congressional Committee, although it is alleged that the stock, bonds, obligations, and properties taken over were those of the N. P. R. R. Co., as reorganized under the Plan of 1875, and not of the Federal Corporation. On the facts alleged the court properly sustained the Demurrer to Paragraph 18 as no question of validity of the mortgages or foreclosures was or could possibly be involved.

The Court then (10/3/35 and 1/29/36) should have dismissed the Amended Bill unless the Government amended by putting in the issues required by the Mandate of the Act of 1929.

POINT 24.

A corporation seeking to reorganize cannot make stockholders sell or take other stocks—Therefore, if this is a valid reorganization appellants are entitled to $203 per share as of July 13, 1896, with interest to date.

POINT 25.

If the so-called Reorganization and foreclosure of 1896 are held valid by the Court, then and in that event appellants are

entitled as relief in the alternative to have all the properties, railroad, lands and assets of the Railway Company charged with a prior lien in favor of the appellants and all non-assenting stockholders in the sum of $203 for each share of railroad company stock held by them with interest at 6 per cent per annum on such amounts from July 13, 1896, until paid.

All of the Northern Pacific Railroad Company's debts and obligations and all of its stock (R., 1058) except the non-assenting stockholders, and all of the reorganization expenses were paid (R., 1059) and satisfied without the Syndicate Members having to put up a cent or having to make good or pay a cent on their guaranty and without any cost to the railway company (R., 1059): sufficient stock of the railway company issued by it as part of its agreed purchase price, which could more than pay the non-assenting stockholders, including these petitioners and those associated with them, the $3,255,900 par value of their railroad stock and also their proportion of all dividends declared on railway company stock since 1896, was returned to the railway company in 1897 in addition to the other stocks, bonds and securities, also part of said purchase price, that were similarly returned to the railway company as listed and set out in Paragraphs 8 and 14 of the Intervening petition (R., 1170 to 1107).

The railway company, its officers and officials are holding all of the preferred and common stock of the railroad company now in its possession, ownership or control as trustees for the holders and owners of the securities and stocks of the railway company issued since July 1, 1896, whether issued as a corporation, a *de facto* corporation, a partnership or other association and the said railway company, its officers and officials should be enjoined and restrained from in any manner selling, disposing of or transferring said preferred and common stock of the railroad company or any part thereof or a trustee should be appointed to take possession and control of same for the security and protection, of the holders of any and all securities and stocks issued by the said railway company since

July 1, 1896, and of the public in order that there may be no break in the market of said securities and stocks of said railway company.

The sworn statement of the railway company to the State of Montana, July 13, 1896 (R., 1060), that *only $4,300 was "actually"* paid in in cash on railway company stock contradicts and overcomes any claim that the so-called *deposits of $10.00* and $15.00 on railroad stock was in payment for railway company stock, or for working capital or for rehabilitation; the so-called deposits collected and pocketed by the Syndicate amounted to approximately $12,000,000.

Any contention that the deposits were on the railway company stock is contrary to the Wisconsin statute, Section 1751, in force in 1896, which provided as follows: "No corporation shall issue any stock or certificate of stock except in consideration of money, or labor or property estimated at its true money value, actually received by it equal to the par value thereof," etc.

The invalid *so-called reorganization* of 1896 was not, as customarily is done, left to a *Committee,* but *J. P. Morgan & Company were made Reorganization Managers,* and all of the assenting stock of the railroad company was sold to them so they could and did exercise the *right of ownership* and voting, and they also owned and voted during the same period the stock of the railway company.

All of the deposits made by assenting stockholders of $10 and $15 went to the Syndicate for further profits and expenses, and none of it went to the Railroad Co. or Railway Co., for working on rehabilitation capital as was required by the so-called Plan; this is admitted by documents, papers and testimony and statements of various officials.

In *C., R. I. & P. R. R. Co.* vs. *Howard,* 19 L. Ed. 117 at 119, Court said:

Those proposing to sell agreed that they would, with all possible dispatch, cause the mortgages on the railroad to be foreclosed, and that the entire property of the Company, real and personal, should be sold and conveyed to trustees, and that the same should be transferred to such incorporated company in that State as to the other contracting party should designate as the purchaser of the prop-

erty, if such designation was made within the time therein prescribed.

By the terms of the *agreement* the Chicago and Rock Island Railroad Company agreed to cause to be incorporated in that State a company which should make the purchase, as proposed, for the sum of $5,500,000, and complete the railroad to the place therein mentioned, and the other party stipulated that the purchaser at the foreclosure sale should convey the railroad to the new Company for that consideration. Pursuant to that agreement the mortgages were foreclosed, and the new Company, to-wit: the Chicago, Rock Island and Pacific Railroad Company, was created under the general laws of the State, and the entire property of the railroad was sold at the foreclosure sale, and the purchasers conveyed the same to the new Company as stipulated in the agreement. *All the stockholders in the old Company became thereby entitled,* as against all those who joined with them in negotiating the sale, to a *pro rata share* in the sixteen per cent of the consideration reserved to their use under the scale of *distribution described in* that *arrangement.*

* * * * * *

Conceded fact is, that the property and franchises of the railroad were sold for the consideration specified in the record, and that the mortgage bondholders discharged their lien for eighty-four per cent of that amount, and that the residue of the purchase money remained in the hands of the purchaser discharged of the lien created by the mortgages, and the complainants contend that it was clear of all liens, except that of the creditors. Such a corporation cannot be said to own anything separate from the stockholders, unless it be the tangible property of the company and the franchises conferred by the charter; and it is *conceded by both* parties *that* the *fund in question was derived from a voluntary sale and transfer* of *those identical interests.* They were heavily incumbered by mortgages, and our attention is called to the fact that the provisional arrangement was negotiated by the stockholders and bondholders; but the *decisive answer* to that suggestion is, that the *two Railroad Companies* were *parties* to the subsequent *contract* of sale, and that they both agreed to all the terms of sale and purchase, and to the mode of transferring and of perfecting the title. Prompt payment was secured by the bondholders, and it is highly probable that they received

under that arrangement a larger portion of their claims than they could have obtained in any other way.

In Cook on Corporations (6th Ed.) it is stated:

Sec. 671. "In addition to the objections to a sale of all the corporate property to another corporation, referred to in the preceding section, there often is involved the question of whether the sale may be in exchange for the bonds and stock of the vendee company. In these days of consolidations, reorganizations and mergers of corporations it frequently happens that the purchase price is paid in the stock and bonds of the purchasing company. The question then arises whether the selling company has power to take stock and bonds in payment, and *whether it may compel its stockholders to accept such* stock and bonds upon a distribution of the assets of such selling company. The *general rule* has been that the *stock* of the *vendee* company *received* by the *vendor* company in *payment* for the *property cannot be forced upon dissenting stockholders* of the *vendor* company in a distribution of its assets. *They are entitled to money.* Such of them as do not wish to accept the stock of the new corporation are entitled to the value of their stock in the old corporation in cash, and may have an injunction until they are secured.[2] It has been held that a stockholder may enjoin a sale of all the corporate property to another corporation in exchange for the stock and mortgage bonds of the latter, even though the corporation offers to pay in cash the full value of his stock, and that not even a statute can deprive a stockholder of this right, except possibly under the reserved right to amend the charter. To compel the stockholder to take such stock would be *compelling him to sell his stock.*[1] Moreover, to *compel the stockholders* of the *old corporation* to *accept* the *stock* of the new corporation in payment for their interest in the old *would* be, *in effect,* to *compel* them to *join* the *new corporation,* or, what is the same thing, compel them to *consent to* a *consolidation.*[2] The Supreme Court of the United States has decided that the majority stockholders have no right, upon dissolution, to sell the corporate property to a new corporation for stock in the latter, and then say to the minority, 'We have formed a new company to conduct the business of this old corporation, and we have fixed the value of the

Note 2. *Barnett* vs. *Phila., &c., Co.,* 67 Atl. 912 (Pa.).
Note 1. *Morris* vs. *Elyton, &c., Co.,* 125 Ala. 263.

shares of the old corporation. We propose to take the whole of it and pay you for your shares at that valuation, unless you come into the new corporation, taking shares in it in payment of your shares in the old one'.[3] At the public sale the majority stockholders may buy in the property; but they have no right to buy it at private sale at a price which they themselves put upon it. Where, however, the price is a fair one, and all stockholders are allowed to participate, it is not likely that a court would order a public sale, there being no tangible prospect of benefit from such a public sale. As to a sale of the corporate property for purchase-money bonds in payment, this is equivalent to a sale for money payable in the future, and hence the transaction is not open to the same objections as in the case of stock. Actual fraud, however, will, of course, always invalidate such a sale.''

In *S. P.* vs. *Bogert,* 250 U. S. 463, 63 L. Ed. 1099, the Court said:

''Fifth. Equally unfounded is the contention that the Southern Pacific cannot be held liable because it was not guilty of fraud or mismanagement. The essential of the liability to account sought to be enforced in this suit lies not in fraud or mismanagement, but in the fact that, having become a fiduciary through taking control of the old Houston Company, the Southern Pacific has secured fruits which it has *not shared* with the *minority.* The wrong lay not in acquiring the stock, but in refusing to make a pro rata distribution on equal terms among the old Houston Company shareholders.''

''Seventh. The Southern Pacific also contends that the decree is erroneous because the effect is to give the minority their *pro rata* share in the new Houston Company without their having made any contribution towards satisfying the floating indebtedness of the old; whereas, the floating-debt creditors had a claim against the property prior in interest to that of the old company's stockholders. *Kansas City Southern R. Co.* vs. *Guardian Trust Co.,* 240 U. S. 166, 60 L. Ed. 579, 36 Sup. Ct. Rep. 334; *Northern P. R. Co.* vs. *Boyd,* 228 U. S. 482, 57 L. Ed. 931, 33 Sup. Ct. Rep. 554. The fact that no provision was made for the floating indebtedness is not a bar to the minority obtaining relief. They did not come into court with unclean hands because there were floating-debt creditors unpaid. If any floating-

Note 3. *Mason* vs. *Pewabic Min. Co.,* 133 U. S. 50.

debt creditors have been illegally deprived of rights, it was not by the minority's acts."

"Eleventh. The *certiorari* and return were filed May 3, 1918. On October 8, 1918, separate petitions were filed in this court by Henry J. Chase, by Fergus Reid, by Albert M. Polack, by Francis P. O'Reilly, and by the Corn Exchange Bank, alleging that they were, respectively, owners of stock in the old Houston Company and praying leave to intervene, and that they be permitted to share in the benefits of the decree, or in the alternative, that they be permitted to make such application to the district court. Action on these petitions was postponed to the hearing of the case on the merits. As the case must be remanded to the district court for further proceedings, as above stated, we deny these several petitions without expressing any opinion on their merits and without prejudice to the right to apply to the district court for leave to intervene and share in the benefits of the decree."

The District Court in the same case (226 F. 500 at 512), which was affirmed, found and determined as follows: "It must be held that the defendant has, for the purpose of the present action, obtained the property free from any lien or claims of the general creditors. The plaintiffs did not have an opportunity to prevent the action of the majority stockholders, in thus acquiring the property of the railway company, and the Southern Pacific Company acquired this property subject to any equitable rights which the minority stockholders might have therein. Such cases as *Ervin* vs. *Oregon Ry. & Navigation Co.* (C. C.), 27 Fed. 625; *Farmers' Loan & Trust Co.* vs. *N. Y. & N. R. Co.,* 150 N. Y. 410, 44 N. E. 1043, 34 L. R. A. 76, 55 Am. St. Rep 689; *Sparrow* vs. *Bement,* 142 Mich. 441, 105 N. W. 881, 10 L. R. A. (N. S.) 725; *Backus* vs. *Brooks,* 195 Fed. 452, 115 C. C. A. 354; Cook on Corp., Sec. 662, and cases cited; *Synnott* vs. *Cummings* (C. C.), 116 Fed. 40—sufficiently establish the proposition that the minority stockholders had rights which they could enforce against the property in the hands of the majority stockholders. In enforcing these rights, they can insist upon an accounting and division of their property in equity, leaving the property, that is, the shares of stock in their hands, subject to any claims which are still valid and enforceable against the stockholders, either through the Houston & Texas Central Railway Company itself, or against the stockholders directly." (See quotation under Point 3.)

See full quotation from *Thompson* vs. *Deal,* 67 App. D. C. 327; 92 F. (2d) 478. (Appendix, p. 88.)

In *Moore* vs. *Los Lugos Gold Mines,* 172 Wash. 570, 21 Pac. (2d) 253, the Court held and said at page 588: "Nor may a corporation be dissolved or reorganized other than in the manner prescribed by the statute.

'A corporation has no inherent power to incorporate or reorganize. Generally, a reorganization can be effected only by virtue of statutory authority. * * * The right to reincorporate or to reorganize is like the right to incorporate in the first instance, and can only be exercised by virtue of legislative authority.' Thompson on Corporations (3d Ed.), Sec. 5966.

'But where there has been no judicial sale of the property, a reorganization can be accomplished by the stockholders *only upon the consent* and *agreement of all,* unless there is some statutory provision or an agreement by which the stockholders either not consenting or not consulted shall be protected.' Thompson on Corporations (3d Ed.), Sec. 5988."

* * * * * *

"A pertinent authority is *Whicher* vs. *Delaware Mines Corporation,* 15 P. (2d) (Ida.) 610. In that case, the reorganization was attempted by a majority of the stockholders instead of by mere action of the board of trustees, as in the case at bar. Citing with approval *Theis* vs. *Spokane Falls Gas Light Co.,* 34 Wash. 23, 74 Pac. 1004, the court said:' " * * * 'There can be no question as to the right of stockholders to reorganize their corporation, but this right is subject to this well-defined rule that a part of the stockholders, *even a majority, cannot reorganize* and deprive nonconsenting stockholders of their property or change their contract rights, *without their consent.* A *stockholder has a vested interest in the corporate property* and *earnings,* represented by his shares of stock, of which he cannot be deprived, in the absence of a delinquency which justifies and authorizes forfeiture * * * .'

"In other words, nonassenting stockholders 'may not lawfully be compelled to accept a change of investment made for them by others, or to elect between losing their interests or entering a new company'. *Geddes* vs. *Anaconda Copper Mining Company,* 254 U. S. 590, 41 S. Ct. 209, 212, 65 L. Ed. 425. Other cases to the same effect are."

In *United States* vs. *N. O. P. Ry. Co.,* 248 U. S. 507, 63 L. Ed. 388, the Court found and determined: "The suits were brought by the United States, the defendants being the patentee and the present holders of the title under the patents. The relief prayed was that the patents be canceled, or, if that be not done, that the homestead *claimants be decree to be the equitable owners, and that a trust in their favor be declared and enforced. Of these alternative prayrs, the latter was better suited to the case stated.*"

* * * * * *

"The existence and extent of these claims were well known among the people of the neighborhood, and the improvements and evidences of inhabitancy and cultivation on each tract were such that anyone purchasing under the land grant would be charged with notice of the nature and extent of the settler's claim."

* * * * * *

"As the patents were issued before and the suits were brought more than five years after the *act* * * * , the prayer that the patents be cancelled must be put out of view and the alternative prayer that the title under the patent be declared to be held in *trust* for the homestead claimants and the trust enforced must be regarded as if standing alone."

And the trust was established and enforced.

See last paragraph in *Jackson* vs. *Ludeling,* 88 U. S. 616, 22 L. Ed. at 495, quoted herein, p. 127.

In *United States* vs. *Dunn,* 268 U. S. 121, 69 L. Ed. 876, the Court held: "Where a guardian fraudulently leases his ward's property, the ward may, at his option, follow the property until it reaches the hands of an innocent holder for value, or claim the proceeds of the lease in the hands of him who fraudulently acquired it from the guardian.

One securing, through corrupt action of a guardian, property of the ward, *becomes a trustee exmaleficio,* and equitably bound to hold for the benefit of the ward, or, in case he disposes of the property, bound to hold the proceeds under like obligation.

One who, with full knowledge of the facts, purchases from a guardian stock which he receives as consideration for making a lease of his ward's property, takes subject to a trust in favor of the ward."

The Court said at page 882: "The legal principles governing the right to follow trust funds diverted in breach of the trust were succinctly and accurately stated by Tur-

ner, L. J., in *Pennell* vs. *Deffell,* 4 De G. M. & G. 372, 388, 43 Eng. Reprint 551, as follows: 'It is * * * an undoubted principle of this court that, as between *cestui que* trust and trustee and all parties claiming under the trustee, otherwise than by purchase for valuable consideration without notice, all property belonging to a trust, however much it may be changed or altered in its nature or character, and all the fruit of such property, whether in its original or in its altered state, continues to be subject to or affected by the trust.'

To the same effect are *Oliver* vs. *Piatt,* 3 How. 333, 401 11 L. Ed. 622, 652; *Lane* vs. *Dighton,* 1 Ambl. 409, 27 Eng. Reprint 274; *Ex parte Dumas,* 1 Atk. 232, 233, 26 Eng. Reprint 149, 2 Ves. Sr. 582, 28 Eng. Reprint 373; *Taylor* vs. *Plumer,* 3 Maule & S. 562, 571, 105 Eng. Reprint 721, 2 Rose 457, 16 Revised Rep. 361; (133) *Cobb* vs. *Knight,* 74 Me. 253; *People* vs. *California Safe Deposit & T. Co.,* 175 Cal. 756, L. R. A. 1918A, 1151, 167 Pac. 388; *Hubbard* v. *Burrell,* 41 Wis. 365.

The rule is the same as against a fraudulent vendee who has exchanged the property purchased for other property. *American Sugar Ref. Co.* vs. *Fancher,* 145 N. Y. 552, 27 L. R. A. 757, 40 N. E. 206.

The rule is the same with respect to the proceeds of property tortiously misappropriated and found in the hands of the tort-feasor or his transferee with notice. *Newton* vs. *Porter,* 69 N. Y. 133, 25 Am. Rep. 152."

To the same effect is *Ervin* vs. *Navigation Co.,* 27 Fed. 630 (C. C. S. D. N. Y.), cited above pp. 59 and 131, that the majority are trustees for the minority.

See *First National Bank* vs. *Flersheim,* 290 W. S. 509, 78 L. Ed. 475, quoted under Assignment of Error I, above.

In Thompson on Deal, 67 Appl. D. C. 327, 92 F. (2d) 478, held that suit to impress a trust and to compel restoration is properly brought as a class suit (see quotation in Appendix, p. 88).

ASSIGNMENT OF ERROR III.

This assignment of error (Appendix p. 71) is addressed to the error of the Court in denying the first exception of the defendants to the master's first report (R., 662), thereby denying the general motion to dismiss the amended bill.

The Commissioner's holding was if the motion was granted there could be no accounting, but in this he was wrong. The reasons justifying the motion to dismiss are set out in the Motion (R., 244, *et seq.*), and heretofore in this brief under different Points.

Further discussion of this and the following assignments of error are necessarily limited because of the restriction on the length of this brief by the rules and Court.

ASSIGNMENT OF ERROR V.

This assignment of error (R., 1219) is addressed to the error of the Court in denying the second exception of the defendants (R., 663) to the master's first report, thereby striking out the plea of laches. (Assignment is in Appendix, p. 72.)

The Government whenever it contracts with private parties thereby lays aside its sovereignty and is treated by the Courts as citizens are treated; this is the well established rule in the Court of Claims and Supreme Court.

ASSIGNMENT OF ERROR VI.

This assignment of error (R., 1219) is in Appendix (p. 72) and contests the Court's ruling in denying the plea of defendants' of *res judicata,* and thereby overruling their third exception to said first report of the master (R., 663).

The same argument is applicable here as that addressed to the second exception above.

ASSIGNMENT OF ERROR VII.

This assigns as error the denial of defendants' fourth exception to first report of master overruling the demurrer to the XXII paragraph of the amended bill (R., 663; Appendix, p. 72).

This paragraph relates to what is known as the Portage, Winnebago & Superior R. R. grant of May 5, 1864 (13 Stats. 66).

This paragraph is not sufficient under the Ruling of

Secretary Smith some thirty odd years ago in 21 L. D. 412; such a ruling by an administrative branch of the government, unchanged or unchallenged by Congress or the courts will not after so long a time be overruled by the Courts.

ASSIGNMENT OF ERROR VIII.

This assignment (R., 1220; Appendix, p. 73), assails the decrees of March 9 and 22, 1938 (R., 1187, 1209), denying,—not striking out—appellant's motion to construe, modify or amend second report of master (1182), as he assumed, without any pleadings or evidence that the title and ownership of the railroad properties had passed to the railway company, and because he had confused by various terms the meaning of the report.

Smith vs. *Seibel,* 258 Fed. 454 (D. C. Iowa), held that the legal conclusions from the facts found is a master's report, or which are not disputable, can be asserted and considered and determined by the Court, although no exception was filed; but here appellants and railroad Co. by Minority stockholders filed exceptions (R., 1185).

Some few times in the report the master spoke as if the property belonged to the railroad company; the report not only is erroneous and too indefinite but it is unfair.

The Court will note that the lower Court heard and determined this motion on its merits, and did not strike it, consequently recognizing the Movants as parties to the cause.

ASSIGNMENT OF ERROR XII.

This assignment (Appendix p. 74) is to the error in striking out motions of appellants and railroad company by minority stockholders to re-refer the second report of the master for a full and complete taking of testimony on important matters. The railroad company is more vitally interested in a complete hearing and report than any other party to this litigation.

ASSIGNMENTS OF ERROR XIV AND XV.

These assignments (Appendix pp. 75, 76) relate to procedural errors in that in several instances the Court struck out pleadings or motions to which no objections had been made, or motions to strike filed.

On August 25, 1937 (R., 951), minority stockholders on behalf of the railroad company filed a motion to extend the time within which the railroad company might file exceptions to the second report of the master. No objections to, or motions to, strike this motion were filed or made, and although the exceptions were filed February 19, 1938 (R., 1185), and should have been received as matter of course under the practice, and considered, yet the Court by decree of March 9, 1938 (R., 1187), struck out the motion to extend time, and then by said decree struck out the exceptions of the railroad company by minority stockholders, and of the appellants, notwithstanding no objection had been made to, or motion filed to, strike the exceptions; the court seemingly took charge of the case for the Government and the railway company.

ASSIGNMENT OF ERROR XXIV.

This assignment (R., 1231, Appendix, p. 81) alleges error by holding that after a fund is established in this cause that appellants and others could come back into the cause and assert ownership, but in doing so the court used words that would become *res judicata* against appellants and other minority stockholders and against the railroad company—this was the decree of March 9, 1938,—but in the decree of March 22, 1938, this was rectified by a modification so as to remove the *res judicata*. But the modified decree erroneously keeps and prevents the railroad company by minority stockholders and the appellants from participating in the trial and hearings of this cause, which is very prejudicial to the railway company, and beneficial to the railway company and the Government who are cooperating together to hinder appellants and minority stockholders and to prevent the rights of the railroad com-

pany from being fairly and fully heard and determined, and findings made, by the Court for Congress.

None of them seem to have any regard for the mandate of Congress.

ASSIGNMENT OF ERROR XXV.

"The court erred in sustaining the plaintiff's Exception No. 12, involving Absaroka and Beartooth forest."

ASSIGNMENT OF ERROR XXVI.

"The court erred in sustaining plaintiff's Exceptions No. 16 to 27, inclusive, and Nos. 38 and 39, involving substitution of base."

ASSIGNMENT OF ERROR XXVII.

"The court erred in sustaining the plaintiff's Exception No. 40, 43, (a), (b), and (e), 44, 48, and 49, involving the availability of withdrawing lands for indemnity selection, and Nos. 55 and 56, involving Fort Ellis Military Reservation."

A careful study of the report of the Commissioner on each of the subject matters of the preceding three assignments of error will quickly demonstrate the fallacy of the Court's decision in sustaining the exceptions of the United States (R., 893 to 949).

ASSIGNMENT OF ERROR XXXII.

"The court erred in the Orders of March 9th, 1938, and of March 22, 1938, in striking out the Answer and Cross-Bill, in not permitting the filing of the Intervention Petition, and in not requiring the Northern Pacific Railway Company and plaintiff to answer same, and in not requiring the Northern Pacific Railway Company to answer the Interrogatories and produce the papers and documents called for in Interrogatories, as this Appellant is entitled, and it is necessary for Appellant in preparation for the hearing on the ownership of the funds and property to be established to have said data and documents."

As the Court by the decrees thus holds the appellants and the railroad company by minority stockholders in the court for future hearings, and as it also denied motions of

theirs on their merits instead of striking out, the Court cannot by this method relieve the railway company from answering the interrogatories and cross-bill, and the Government from answering the cross-bill.

Such action and procedure by the Court is in direct violation of Equity Rule 58; Civil Procedure Rule 33.

ASSIGNMENTS OF ERROR XXVIII, XXIX, XXX AND XXXI.

Lack of space necessitates leaving any discussion of these four assignments until the oral argument or reply brief.

These assignments contend that the Court erred in denying the four exceptions of the railroad company to the master's second report (R., 703, 725-9, 846-65).

CONCLUSION.

While the Supreme Court under its discretionary power can limit the hearing to one matter in a decree, this Court has no such power; an appeal to a decree is mandatory if the decree is final, and this Court cannot divide a decree, but this Court on the other hand can determine all matters in the record that are necessary or proper for speeding and facilitating future proceedings in the cause and in terminating litigation as early as possible.

In Jurisdiction of the Supreme Court of the U. S. by Robertson and Kirgham, at page 558, it is stated: "A limitation in an order granting *certiorari* is binding upon counsel, and the Court will not hear argument on questions outside the scope of the order; but, while decision ordinarily does not exceed the limits of the order, the *Court has not regarded itself as thereby restrained from consideration of any question presented by* the *record which* it thereafter finds necessary or *proper to decide.*[88] In addition, facts developed at the argument may turn the case upon sub-

[87]See, for example, *Prudence Co.* vs. *Fidelity & Deposit Co. of Maryland,* 297 U. S. 198, 205, 56 S. Ct. 387, 80 L. Ed. 581.

[88]*Olmstead* vs. *United States,* 277 U. S. 438, 48 S. Ct. 564, 72 L. Ed. 944, 66 A. L. R. 376.

sidiary issues and render unnecessary or improper the decision of the question to which the re-examination was limited.[89]

It is also not uncommon for the Supreme Court to withhold its ruling upon a petition for *certiorari* until the happening of intervening events shall have assisted in a determination of the question whether the writ should issue."[90]

Wolfle vs. *United States,* 291 U. S. 7, 54 S. Ct. 279, 78 L. Ed. 617 (see the order granting *certiorari,* 290 U. S. 617, 54 S. Ct. 87, 78 L. Ed. 539).

An analogous situation is disclosed in cases like *Berger* vs. *United States,* 295 U. S. 78, 80, 81, 55 S. Ct. 629, 79 L. Ed. 1314, where the petition for *certiorari* is granted for the expressed reason that a conflict of decisions exists, but the Court, after deciding that point, *proceeds to the decision of another question* in the case, as to which there was no direct conflict, in order that the *case may be properly disposed* of in the *light* of the *situation revealed* by the *entire record.*

Mitchell vs. *Maurer,* 293 U. S. 237, 55 S. Ct. 162, 79 L. Ed. 338 (see the order granting *certiorari,* 293 U. S. 544, 55 S. Ct. 71, 79 L. Ed. 648).

Compare *Wolfle* vs. *United States,* cited in the preceding note, where the decision, in a supervening case, of the question to which the re-examination was limited, invited a consideration of other and related questions *in order to terminate the litigation.*

Appellants believe that it is clearly shown by the records and briefs that the pending application of the Northern Pacific Railroad Company by Schmidt and others, minority stockholders, should be granted and forthwith reversed.

Also that in this appeal the decree of March 9, 1938, should be reversed as well as both decrees of March 22, 1938, and the decrees of May 24, 1932, October 3, 1935, and

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[89]*McCandless* vs. *Furlaud,* 293 U. S. 67, 71, 55 S. Ct. 42, 79 L. Ed. 202,

[90]When action on a petition for *certiorari* is withheld, it is usually to await decision in a related case by the Supreme Court. Thus, in *United States* vs. *Anderson,* 284 U. S. 584, 52 S. Ct. 125, 76 L. Ed. 505, and *Burnet* vs. *Howes Bros. Hide Co.,* 284 U. S. 583, 52 S. Ct. 126, 76 L. Ed. 505, action was withheld pending decision in *Handy & Harman* vs. *Burnet,* 284 U. S. 136, 52 S. Ct. 51, 76 L. Ed. 207, after which petitions in both cases were granted and the decrees reversed *per curiam* on the authority of that decision. A similar procedure was followed in *United States* vs. *Corriveau,* 286 U. S. 530, 52 S. Ct. 578, 76 L. Ed. 1271."

the decree amending same January 29, 1936, and the cause remanded with instructions to permit the amendment of the cross-bill applied for at the bar of the lower court by making all the allegations and interrogatories of the intervening petition allegations and interrogatories of the said cross-bill and that the said cross-bill as amended with interrogatories and the intervening petition with interrogatories be filed and that the Government and Northern Pacific Railway Company and other defendants be required to answer the said cross-bill, intervening petition and interrogatories; that this Court decide and state in its opinion all the questions of law arising on the face of this record for the guidance of the lower court on the trial of the cause on its merits. That the said decrees be reversed with costs.

Respectfully submitted,

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Dated October 18, 1938.

APPENDIX


LAKE SUPERIOR
MINNESOTA POINT
WISCONSIN POINT
ENTRY
ALLOUEZ BAY
ST. LOUIS BAY
BAY OF SUPERIOR
WEST DULUTH
BELKNAP AVE.
CLOUGH ISLAND
SPIRIT LK.
SUPERIOR
SOUTH SUPERIOR
EAST SUPERIOR
ITASCA
POST OFFICE
ST. LOUIS
CENTRAL SUPERIOR
BOYLSTON
WALBRIDGE
T49
T48
MINNESOTA STATE LINE

(A)

PRIVATE LAWS OF WISCONSIN FOR 1872.

Chapter 139, page 340, March 25, 1872.

An Act to amend Chapter 455, private and local laws of 1865, and Chapter 233, private and local laws of 1870, and to prescribe further conditions upon which the Northern Pacific Railroad Company may construct and operate a railroad and telegraph line in this state.

Section 1. Any consent heretofore given by the legislature of this state to the N. P. R. R. Co. to construct, operate and maintain a railroad and telegraph line in the state of Wisconsin, is hereby made subject to the further condition that the said N. P. R. R. Co. shall construct and forever maintain and operate to some point on the southwesterly shore of the Bay of Superior, between the Nemadji River and Connor's Point, a line of railroad, connecting with and continuous of the main line of said N. P. R. R., by a route running south of St. Louis River from the junction of said N. P. R. R. with the Lake Superior & Mississippi R. R., intersecting the western boundary of Wisconsin at some point between the St. Louis and Nemadji Rivers, and running thence all the way in Wisconsin between said rivers, and also shall construct and forever maintain, at some place where said railroad shall touch the Bay of Superior, between the said Nemadji River and Connor's Point, sufficient docks or piers, suitable and convenient for the transfer of passengers and freight from its cars on said road to lake-going craft, and from said craft to said cars. And also, shall establish and forever maintain and some point between the said Nemadji River and Connor's Point, a sufficient depot for the accommodation of passengers. And until the said N. P. R. R. Co. shall construct and operate such railroad to the southwesterly shore of the Bay of Superior as aforesaid, and shall so construct said docks or piers and the said depot, it shall not be lawful for the said company to construct or maintain or operate any other railroad in Wisconsin; *provided,* that the provisions of this section shall not apply to any road within the boundaries of Pierce or Saint Croix [county].

Section 2. A purchase by the Northern Pacific Railroad Company of, or the consolidation of its line with any other railroad whose line shall conform to the route above prescribed, shall, for the purpose of this act, be deemed equivalent to a construction by said Northern Pacific Railroad Company of its said railroad, for such distance as the road so purchased or consolidated with shall be constructed on said route.

Section 3. The said N. P. R. R. Co. is hereby forever prohibited from constructing, maintaining or operating any railroad or railroad bridge, or bridge of any kind, across the Bay of Superior between Minnesota Point and the shores opposite the same.

Section 4. The said N. P. R. R. Co. shall be governed by the provisions of the general railroad law of this state in respect to the width of the roadway and acquiring title to lands.

Section 5. The foregoing limitations upon the powers of the N. P. R. R. Co. are hereby declared to be conditions of any consent given by this state to said company to construct a railroad or telegraph line in this state.

Approved March 25, 1872.

GENERAL LAWS OF WISCONSIN FOR 1880.

Chapter 290, Page 347, March 15, 1880.

An Act to promote the development of the unsettled portions of Northern Wisconsin and to encourage the building of railroads therein.

Section 1. Any railroad company which shall first construct a railroad across northern Wisconsin, from Ashland or any point on Lake Superior, between townships forty-seven and fifty-one north, and east of range six west, on Lake Superior, to a junction with the Northern Pacific Railroad, and shall run cars over the same, within three years from the passage of this act, shall be relieved from the payment of any license fees on said road, between said Northern Pacific railroad and the point on Lake Superior above designated, for the period of 10 years from the date of its completion.

APPENDIX

17 U. S. Statutes at Large 477. (Feb. 27, 1873.)

Chap. CCVII—AN ACT TO AUTHORIZE THE NORTHERN PACIFIC RAILROAD COMPANY TO CONSTRUCT AND MAINTAIN A BRIDGE ACROSS THE ST. LOUIS RIVER.

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, That the Northern Pacific Railroad Company is hereby authorized to construct and maintain a draw-bridge across the Saint Louis river between Rice's point, in the State of Minnesota, and Connor's point, in the State of Wisconsin. That the said bridge shall be not less than ten feet above the level of the water of said river at the point where its construction is hereby authorized; that said bridge shall have a pivot-draw giving two clear openings of one hundred feet each, measured at right angles to the current at the average stage in the river, and located in a part of the bridge that can be safely and conveniently reached at that stage; and the next adjoining spans to the draw shall not be less than one hundred and fifty feet, if the proper location of the draw over the channel will admit spans of this width between it and the shore; and said span shall not be less than ten feet above extreme high-water mark, measuring to the bottom chord of the bridge; that said draw shall be opened promptly, upon reasonable signal, for the passage of boats whose construction shall not be such as to admit of their passage under the stationary spans of said bridge, except when trains are passing over the same; but in no case shall unnecessary delay occur in opening the said draw before or after the passage of trains.

*D*ec. 2. That the piers of the said bridge shall be built parallel with the current at that stage of the river which is most important for navigation; and that no ripraps or other outside protection for imperfect foundation will be permitted in the channel-way of the draw-openings.

Sec. 3. That the said Northern Pacific Railroad Company shall submit to the Secretary of War, for his examination, a design and drawings of the bridge and piers, and a map of the location, giving, for the space of at least one mile above and one mile below the proposed location, the topography of the banks of the river, the shore-lines at

high and low water, the direction of the current at all stages, and the soundings accurately showing the bed of the stream, the location of any other bridge or bridges, and shall furnish such other information as may be required for a full and satisfactory understanding of the subject by the Secretary of War; and if the Secretary of War is satisfied that the provisions of the law have been complied with in regard to location, the building of the piers may be at once commenced; but if it shall appear that the conditions prescribed by this act cannot with at the location where it is desired to construct the bridge, the Secretary of War shall, after considering any remonstrances filed against the building of said bridge, and furnishing copies of such remonstrance to the board of engineers provided for in this act, detail a board composed of three experienced officers of the corps of engineers, to examine the case, and, on their recommndation, authorize such modifications in the requirements of this act, as to location and piers, as will permit the consrtuction of the bridge, not, however, diminishing the width of the spans contemplated by this act: PROVIDED, That the free navigation of the river be not materially injured thereby.

Sec. 4. That all parties owning, occupying, or operating the said bridge shall maintain, at their own expense, from sunset to sunrise throughout the year, such lights on their bridges as may be required by the lighthouse board for the security of navigation; and all persons owning, occupying or operating the said bridge shall, in any event, maintain all lights on their bridge that may be necessary for the security of navigation.

Sec. 5. That any bridge constructed under this act, and according to its limitations, shall be a lawful structure, and shall be recognized and known as a post-route, upon which, also, no higher charge shall be made for the transmission over the same of the mails, the troops, and the munitions of war of the United States than the rate per mile paid for the transportation over the railroads or public highways leading to said bridge; and the United States shall have the right of way for postal-telegraph purposes across said bridge; and in case of any litigation arising from any obstruction or alleged obstruction to the navigation of said river, created by the construction of said bridge under this act, the cause or question arising may be tried before the district court of the United States of

any state in which any portion of said obstruction or bridge touches.

Sec. 6. That all railway companies desiring to use the said bridge shall have and be entitled to equal rights and privileges in the passage of the same, and in the use of the machinery and fixtures thereof, and of all the approaches thereto, under and upon such terms and conditions as shall be prescribed by the Secretary of War, upon hearing the allegations and proofs of the parties in case they shall not agree.

Sec. 7. That the right to alter or amend this act, so as to prevent or remove all material obstructions to the navigation of said river by the construction of the said bridge, is hereby expressly reserved, without any liability of the government for damages on account of the alteration or amendment of this act, or on account of the prevention or requiring the removal of any such obstructions; and if any change be made in the plan of construction of any bridge costructed under this act, during the progress of the work thereon or before the contemplation of said bridge, such change shall be subject to the approval of the Secretary of War; and any change in the construction, or any alteration of said bridge that may be directed at any time by Congress, shall be made at the cost and expense of the owners thereof.

Approved, Feb. 27, 1873.

Wisconsin Act of April 10, 1865, Chapter 485, authorizing N. P. R. R. Co. to build in Wisconsin.

Section 1. The consent of the state of Wisconsin is hereby given to the Northern Pacific Railroad Company, incorporated in an act of Congress entitled, "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's Sound on the Pacific Coast by the northern route," approved July 2nd, 1864, to survey, lay out, locate, construct, furnish, maintain and enjoy a continuous railroad and telegraph line with the appurtenances within its limits on the line in the said act of Congress indicated and authorized; and for the purposes aforesaid, and in said act of Congress set forth and in order to carry the same into full effect the said Northern Pacific Railroad Company, its successors and assigns, are hereby vested with all the rights, powers, privileges and immunities within the limits of this state which are by said act of Congress conferred on them

within the territories and jurisdiction of the United States; provided that the said Northern Pacific Railroad Company shall be prohibited at any time prior to the actual building or equipment of said railroad from allowing any railroad company chartered by the laws of the state of Minnesota to use and enjoy any of the privileges hereby granted to the Northern Pacific Railroad Company, to be exercised in the state of Wisconsin; and provided further, that nothing herein contained shall be construed to prevent the said Northern Pacific Railroad Company after the building and equipment of said road through the state of Wisconsin from making such contracts and connections with Minnesota railroads in the state of Wisconsin as they may deem proper.

Section 2. This act shall take effect and be in force from and after its passage and publication.

Amendment of Act of April 10, 1865, Chapter 485, by Act of March 10, 1870, Chapter 253:

Section 1. Chapter 485 of the private and local laws of 1865 is hereby amended by adding to the end of the first section thereof the following, to-wit: and provided further that it shall not be lawful for the said Northern Pacific Railroad Company to build the line of its road from Minnesota into Wisconsin nor from Wisconsin by crossing in any manner, whether by bridge, ferry or otherwise, the entry of the bay of Superior between Minnesota Point in the state of Minnesota and Wisconsin Point in the state of Wisconsin nor to construct or operate any railroad on or along the said Wisconsin Point for the purposes of a connection by that route with its own or any other railroad that may be constructed on or along said Minnesota Point. And the consent hereinbefore given is upon the express condition and understanding that at any time before the said Northern Pacific Railroad Company shall construct and operate to some point in Wisconsin on the west shore of the bay of Superior, a line of railroad continuous of and connecting with its main line in Minnesota by a route intersecting the western boundary of Wisconsin between the Nemadji and the St. Louis rivers and running all the way in the latter state between said rivers, it shall permit any other railroad which may be constructed from the west shore of the bay of Superior in Wisconsin to any point on the line of the said Northern Pacific railroad,

whether in Wisconsin or Minnesota, to make a connection with the said Northern Pacific Railroad on such terms and conditions as shall afford as good advantages and facilities in the respect of charges and dispatch, and in all other respects for the transportation of freight and passengers, between the eastern terminus aforesaid of the said other railroad and all points on the said Northern Pacific Railroad as shall be enjoyed for the transportation of freight and passengers between the Minnesota shore of the bay of Superior, or of St. Louis Bay or of Lake Superior, and all points on the said Northern Pacific Railroad, whether over the latter road or any other railroad with which it may have connections or both. And the Legislature may at any time hereafter pass such laws and authorize such proceedings as may be necessary to enforce the observance of any provision or condition of this act according to its spirit and intent.

Section 2. This act shall take effect and be in force from and after its passage.

Wisconsin Act of February 20, 1879, Chap. 44.

An act to enable Douglas County to compromise the litigation concerning its outstanding bonds and to use a portion of same to accomplish the purpose for which they were used.

Whereas the county of Douglas in 1872 issued to the Superior & St. Croix Railroad Company three hundred and fifty bonds of said county, of one thousand dollars each, to aid in the construction of a railroad in said county; and whereas, subsequently, seventy-five of the said bonds were delivered to the firm of Walbridge Bros. & Sargeant, contractors, to construct said railroad, and two hundred and seventy-five of said bonds were placed in the hands of the First National Bank of Madison, Wisconsin, as trustee to hold the same on certain conditions; and whereas a protracted litigation has been going on in the courts between said county of Douglas and said firm of Walbridge Bros. and Sargeant and other parties, defendants, in relation to the title and ownership of said bonds, which litigation is about to be mutually arranged and compromised upon such basis that the said two hundred and seventy-five of said bonds are to be returned to said county to be cancelled; but that such compromise depends upon

obtaining authority from the legislature to use fifty of said seventy-five bonds to be delivered to the said firm for the purpose of aiding in the construction of a railroad in said county hereafter; now, therefore,

The people of the state of Wisconsin represented in Senate and Assembly do enact as follows:

Section 1. Upon the depositing by the said firm of Walbridge Bros. and Sargeant with the present chairman of the board of supervisors of said county as trustee, within 40 days from the taking effect of this act, of said 50 bonds, with all the coupons attached thereto when they went into the hands of said firm, it shall be the duty of said board of supervisors as early as they may deem expedient and within the present year, to submit to the qualified voters of said county a proposition in substance as follows: that said fifty bonds shall be delivered by said trustee to such railroad company as shall, on or before a day to be named in said proposition, not less than two nor more than three years after the passage of this act have completed and made ready for use a railroad within the county of Douglas, from the bay of Superior to the Minnesota state line either on or near the company, equal in quality to the Northern Pacific Railroad in Carlton County, Minnesota, in exchange for a like amount of the stock of such company; such bonds not to be delivered until such road is completed and cars running thereon adequate for the demands of business on the road; all the coupons of said bonds falling due prior to such delivery to be cut off by said trustees and cancelled in the presence of the said board.

Section 2. It shall be the duty of the county clerk of said county upon the order and direction of the county board to cause to be published in a newspaper published in said county, if there be one, and to post up in at least three public places in said county, a notice that a special election will be held in said county at the usual place of holding elections upon a day to be mentioned in said notice, not less than fifteen days after the posting of said notices and publication, if there be one; at which election qualified electors shall vote upon the proposition mentioned in the preceding section, which proposition shall be substantially set forth in said notice. Votes cast in such election in favor of such proposition shall be by ballot with the words, "For using bonds for railroad". Votes against

such proposition shall be by ballot with the words "Against using bonds for railroad", written or printed thereon.

Section 3. Such election shall be conducted and the result thereof canvassed, certified, and published in like manner as is provided by law in the case of such election for the election of a county officer so far as such provision may be applicable.

Section 4. If a majority of the votes at such election shall be case in favor of such proposition, it shall be the duty of the trustee having custody of said fifty bonds to safely keep the same and to deliver them, less the coupons required to be cut off, to the railroad company which may be entitled thereto by compliance with the provisions of the first section of this act in exchange for a like amount of stock of such company.

Section 5. If a majority of the votes case at said election shall be against the proposition to use bonds for a railroad, then said trustee shall immediately cancel and destroy said fifty bonds and coupons of the same in the presence of the board of supervisors of said county; and if the majority of votes shall be in favor of said propsition and no company shall become entitled to said bonds by a compliance with the provisions of this act, then the said truste shall cancel and destroy the said bonds and coupons in a like manner.

Douglas County Resolution of January 18, 1882:

Whereupon said county board, at a meeting thereof duly held on the 18th day of January, 1882, passed and adopted the following resolution: "Whereas the county of Douglas by resolution of its board of supervisors passed on the 7th day of September, A. D. 1880 and duly entered in their record of proceeding, offered and agreed to transfer to the Northern Pacific Railroad Company, in aid of the construction of its road to Superior, certain property held by said county and in further aid of such road and to enable all persons interested in the county of Douglas to offer liberal contributions therefor, the said county further agreed to join in any conveyance to the aforesaid company made by such persons of whatever lands they might contribute in behalf of such road, so that their contributions should be without lien and free of all encumbrance, nevertheless upon the conditions that the Northern Pacific Railroad Company should within the year 1881, construct

and equip a railroad from the Northern Pacific Junction entering the state of Wisconsin and running therein between the St. Louis and Nemadji Rivers to the Bay of Superior at or near the mouth of said Nemadji river, and thence to Connor's Point along or near the westerly side of the Bay of Superior, with depot and convenient connection with docks or piers; and the said railroad company having, by resolution of its said board of directors and within the appointed time, duly accepted the offer and terms of agreement so as aforesaid made by and on the part of the said county, and the said Northern Pacific Railroad Company having, before the first day of January, A. D. 1882, constructed, completed and equipped its railroad upon the line aforesaid from the junction above named in Carlton County, Minnesota, to Connor's Point, in the town of Superior, Wisconsin, with a depot and connections in the manner and way as stipulated, and having performed on its part the conditions of such agreement and requested the execution and delivery of the deed or deeds therein provided:

Therefore, Resolved, That the county of Douglas release and convey to the Northern Pacific Railroad Company by quitclaim deed all lots, blocks, pieces and parcels of land and premises heretofore conveyed to Horace S. Walbridge, James Bardon and James B. Power, as trustees for said company, by Hiram S. Walbridge, James Stinson, Laurason Riggs, trustee, and James Stinson and Charles M. Counsel, trustees under the will of James Stinson, deceased, which conveyances are duly of record in this county and that the county clerk be, and he is hereby, directed to execute such release and conveyance in due form and to acknowledge and deliver the same to the said Northern Pacific Railroad Company. See Schedule "B" hereto attached.

Whereas the county of Douglas by resolution of its board of supervisors passed the 7th day of September, A. D. 1880, and duly recorded in their record of proceedings, offered and agreed to transfer by sufficient deed or deeds to the Northern Pacific Railroad Company all alienable lands or lots belonging to said county of Douglas which had been acquired by deed, to which said county had held undisputed title during two years then last passed, upon conditions that the said Northern Pacific Railroad Company should within the year 1881 construct, complete and

equip a railroad from the Northern Pacific Junction entering the state of Wisconsin and running therein between the St. Louis and Nemadji rivers to Connor's Point along or near the westerly side of said bay with depot ad convenient connection with docks and piers; and

Whereas the Northern Pacific Railroad Company by resolution of its board of directors and within the time specified duly accepted in writing the offer and terms of agreement so as aforesaid made by and on the part of Douglas County, and did before the first day of January, A. D. 1882, construct, complete and equip a railroad upon the line aforesaid from the Northern Pacific Junction so called in Carlton County, Minnesota, to Connor's Point in the town of Superior, Wisconsin, with a depot and connections in the way and manner stipulated as aforesaid and has performed on its part the conditions of such agreement and requested the execution of the deed or deeds therein provided:

Resolved, therefore, That the county of Douglas to pursuance to said agreement, release and convey to the Northern Pacific Railroad Company by quitclaim deed all the lots, blocks, pieces and parcels of land and premises described in Schedule "A" hereto attached and that the county clerk be, and he is hereby orderd to execute, acknowledge and deliver such deed to said company for the same."

Wisconsin Act of March 23, 1883, Chap. 150.

Section 1. Any conveyance heretofore made by the county of Douglas to the Northern Pacific Railroad Company under and in pursuance and satisfaction of resolutions of the county board of said county dated September 7th, 1880, and January 12th, 1882, is hereby declared to be valid and effectual to vest in the Northern Pacific Railroad Company the title to the lands conveyed or attempted to be conveyed by such conveyance; and any assignment of tax certificates heretofore made to the said railroad company upon the property or any thereof embraced in and conveyed by said conveyance pursuant to and in satisfaction of and compliance with said resolutions is hereby declared to be valid.

Section 2. This act shall be favorably construed to ren-

der effectual the said conveyance and assignment and shall take effect from and after its passage and publication.

PUBLIC SERVICE COMMISSION OF WISCONSIN
Fred S. Hunt, Chairman
Robert A. Nixon
R. Floyd Green
Calmer Browy, Director
Madison, Wisconsin
September 27, 1938.

Hudson, Creyke & Hudson
Mr. Raymond M. Hudson
404 Peoples Life Insurance Bldg.
1343 H Street N. W.
Washington, D. C.
Gentlemen:

We are enclosing a copy of a letter dated July 18, 1901, addressed to Joseph P. McCullen at Philadelphia by Graham L. Rice, Railroad Commissioner. This letter seems to be the one referred to in your letter of September 15, 1938, as it contains the information relating to the construction of the line northwest of the Nemadji River by the Superior and St. Croix Railroad Company. The infromation was furnished Mr. Rice by Sanborn, Luse, Powell and Ellis who were attorneys for the Northern Pacific Railway Company.

Very truly yours,
PUBLIC SERVICE COMMISSION OF WISCONSIN
FR:mr CALMER BROWY, Director.

COPY
Office of
Railroad Commissioner,
State of Wisconsin
Madison 7/18/1901

Mr. Joseph P. McCullen
1008-1009 Land Title Building
S. W. Cor. Broad & Chestnut Sts.
Philadelphia, Pa.
Dear Sir:—

Your favor of the 15th inst. relative to the Superior & St. Croix R. R. Co.; Northern Pacific Railroad Company, and Northern Pacific Railway Company, at hand.

I understand that the Superior & St. Croix Railroad

Company did construct a railway from Superior to the Minnesota State Line, Northwest of the Menadji river, and this road with the other property of the Company is still owned by it under the name of the Northern Pacific Railway Company. I understand further that the reorganization committee of the Northern Pacific Railroad Company acquired all the stock of the Superior & St. Croix Railroad Company, and then applied to the legislature and secured the pasage of Chapter 244 of the laws of 1895. By this act the name of the Superior & St. Croix Railroad Company was changed to the Northern Pacific Railway Company, and the latter being purchased by *mesne* conveyances all the property of the Northern Pacific Railroad Company through receiver's sale. The bridge and all the construction mentioned, made by the Northern Pacific Railroad Company, passed through the sales above mentioned. No proceeding other than the one reported in 93 Wis. 604 has ever been taken to test the constitutionality of the act of 1895.

Should you desire to bring proceedings to test the constitutionality of the law of 1895, the practice is, I believe, to make application to the Attorney General of the State to annul charter of the company.

I know nothing of the arrangement between the old Northern Pacific Railroad Company and the Superior and St. Croix Railroad Company in reference to the construction of the line.

The records show that July 1, 1896, the Superior & St. Croix Railroad Company changed its name to the Northern Pacific Railway Company, August 18, 1896, Alfred S. Carey, Special Master, sold the Northern Pacific Railroad Company to the Northern Pacific Railway Company.

Respectfully,

Railroad Commissioner.

Senate Resolution No. 247, 59th Congress, 2d Session. February 5, 1907.—Referred to the Committee on Pacific Railroads and ordered to be printed.

Mr. Heyburn submitted the following

RESOLUTION:

Whereas Congress by Act of July second, eighteen hundred and sixty-four, created a corporation under the name an title "Northern Pacific Railroad Company",

to construct and maintain a continuous railroad and telegraph line from Lake Superior to Puget Sound, and conferred upon said corporation a grant of more than forty millions of acres of public lands to aid in the construction of said railroad and telegraph line; and

Whereas whilst there have been two so-called "reorganizations" of the Northern Pacific property, one in the year eighteen hundred and seventy-five and the other in the year eighteen hundred and ninety-six, neither was ratified by Congress, and it is charged that neither reorganization took place under any valid judicial sale, but that in each instance the alleged reorganization was effected by a mere exchange of securities, the stock of the original Federal corporation always remaining as the basis of ownership, said stock, after eighteen hundred and sixty-seven, having been held in trust for a partnership association composed of J. Gregory Smith, of Vermont, and his associates, calling themselves "proprietors," the same being subsequently acquired from said so-called "proprietors" by an unincorporated joint stock association of bondholders formed in the year eighteen hundred and seventy-five as the reorganized "Northern Railroad Company," and on July thirteenth, eighteen hundred and ninety-six, a majority of the shares of stock and obligations of this latter organization of eighteen hundred and seventy-five having been delivered by J. P. Morgan and Company, reorganization managers, to the Wisconsin corporation, now known as the Northern Paific Railway Company, in exchange for the latter's stock and bonds under the terms of a written agreement wherein the Northern Pacific estate was valued at three hundred and forty-five millions of dollars, being one hundred and fifty-five millions of dollars in excess of all indebtedness whatsoever, real or alleged, existing against it, over two hundred and fifteen millions of dollars in excess of the mortgage bonds thereupon issued by said Wisconsin corporation, and over sixty millions of dollars in excess of the entire stock and bonds issued by said Wisconsin corporation in fulfillment of the so-called reorganization; and

Whereas it is charged that the said so-termed reorganization of *of* eighteen hundred and ninety-six was effected by a fraudulent conspiracy against the organization

of eighteen hundred and seventy-five and to the injury of the stockholders thereof, and that it results in a fraud upon the Government of the United States, by wrongfully making it appear that the ownership of the Northern Pacific Railroad, telegraph line, and land grant is no longer vested in a corporation of Congressional creation, over which Congress is possessed of direct and immediate legislative and visitorial power, and it appears that the said Wisconsin corporation in litigation against it instituted by the United States Government, hath undertaken to defend against the enforcement of the Act of Congress of August seventh, eighteen hundred and eighty-eight (Revised Statutes, section fifty-two hundred and sixty-nine), relative to the exercise of telegraphic franchises by railroad and telegraph companies subsidized by the United States, and hath averred therein that it is not subject to the provisions of the said Act of Congress because it never received any subsidy from the United States and because it "is not engaged in operating its said railroad or telegraph lines under any right or franchise derived from the Government of the United States or from any Act of Congress, but owns, operates, and maintains the said line of railroad and telegraph under and by virtue of the laws of the State of Wisconsin, under which it was incorporated and organized, and the laws of the several States in which the lines of railway and telegraph are situate;" and

Whereas these matters are proper subject for investigation by Congress: Therefore

Resolved, That a special committee, to be composed of five members of the Senate, be appointed to investigate fully and to make report as to all matters connected with the reorganization of the Northern Pacific Railroad property; in the course of said investigation to ascertain what title and estate in said railroad, telegraph line, and land grant is held or owned by the corporation created by Congress by Act of July second, eighteen hundred and sixty-four, and if said Federal corporation hath no title to or estate in any property, then to ascertain and report what reason, if any, exists why the said charter Act of July second, eighteen hundred and sixty-four, and its supplements should not be fully repealed by Congress.

Resolved, That said committee be empowered to enforce the attendance of witnesses and the production of all such records, books, papers, and documents as may be deemed necessary in the course of such investigation.

Senate Resolution No. 93, 60th Congress, 1st Session. February 6, 1908.—Referred to the Committee on Pacific Railroads and ordered to be printed.

Mr. Heyburn submitted the following

RESOLUTION:

Whereas the Northern Pacific Railway Company, a Wisconsin corporation, claims ownership of all the property and estate formerly of the Northern Pacific Railroad Company, a corporation created by Congress, and in certain litigation instituted by the United States Government in the United States circuit court for the district of Minnesota for the enforcement of the Act of Congress of August seventh, eighteen hundred and eighty-eight (Revised Statutes, section fifty-two hundred and sixty-nine), relative to the exercise of telegraphic franchises, the said Wisconsin corporation, opposing the enforcement of said statute and of the duties and obligations imposed by Congress as to the Northern Pacific railroad and telegraph line, asserted and averred that by reason of certain foreclosure proceedings and of the purchase of the Northern Pacific estate thereunder on and subsequent to July twenty-fifth, eighteen hundred and ninety-six, the said Wisconsin corporation, and the said property, are relieved from any of the obligations created by the various Acts of Congress which were set forth in the bill of complaint of the United Staes; and

Whereas said Wisconsin corporatoin has certified to the Interstate Commerce Commission that its capital stock of one hundred and fifty-five millions of dollars was issued "for the purchase of the Northern Pacific Railroad Company's property", and from the statement of said Wisconsin corporation, filed with the State of Montana (a certified copy of which is annexed to this resolution), it appears that all of said stock was issued on and prior to July thirteenth, eighteen hundred and ninety-six, before any of said judicial sales occurred, and that, with the exception of forty-three shares

thereof, all of said stock was issued in payment for the "stocks, bonds, and securities formerly of or belonging to the Northern Pacific Railroad Company, or of interests therein", which stocks, bonds, and securities it was recited in said statement "had a cash value exceeding forty millions of dollars"; and

Whereas it is a matter of public concern that it should be ascertained whether the ownership by the said Wisconsin corporation of the Northern Pacific Railroad, land grant, and telegraph line is acquired by virtue of valid foreclosure sales divesting the title of the Northern Pacific Railroad Company or whether the same is acquired by purchase of certain securities of the latter company, to the end that it may be determined whether the legal title to the property itself—the railroad, telegraph line, and lands—is vested in a State corporation or in a corporation of Congressional creation over which Congress is possessed of direct and immediate legislative and visitorial power; and

Whereas, to enable a vast and unwarranted increase to be made in the issuance and marketing of new stocks and bonds, it is alleged that the said Wisconsin corporation upon acquiring the possesion of the Northern Pacific estate at once placed upon the same a valuation many millions of dollars in excess of the actual cost thereof, as well as many millions in excess of the valuation which had been reported and returned for the same property immediately prior thereto whilst in the possesion or ownership of the Northern Pacific Railroad Company: Therefore

Resolved, That the President be, and he is hereby, requested to furnish to the Senate such information as may be obtainable from the Department of Justice, the Department of the Interior, and the Interstate Commerce Commission upon the matters herein referred to, and to inform the Senate whether on behalf of the Government, through the Department of Justice or otherwise, any investigation has ever been made as to the method of the so-called "reorganization" of the Northern Pacific Railroad Company under which the Wisconsin corporation, known as the Northern Pacific Railway Company, claims to have acquired the title to the Northern Pacific estate, and if so, with what result.

MODIFIED REPLY BRIEF OF APPELLANTS.

An examination of the record indicates that on every move by the appellants in this suit the opposition has been originated, initiated and filed by the attorneys for the Government and not the attorneys for the railway company, although in all but one or two instances the railway attorneys followed the Government attorneys.

It is hard to understand why the Government attorneys are so vigorously opposing this appeal as they state that the Government is not interested except as to expediency, which is no ground for refusing an appeal, unless they are peeved by the appellants' pointed criticism of the Attorney General for violating the mandate of the Statute of June 25, 1929 (46 Stats. 41; U. S. Code Title 43, Sections 921-925).

Counsel is surprised that anyone would oppose the granting of this appeal in the face of this Court's decision in *Cathay Trust, Ltd.,* vs. *Brooks,* 193 Fed. 973 (C. C. A. 9; *Richfield Oil Company* vs. *Sawtelle, Judge,* 279 Fed. 851 (C. C. A. 9); *Richfield Oil Co.* vs. *Western Machinery Co.,* 279 Fed. 852 (C. C. A. 9); and *Washington* vs. *United States,* 87 F. (2d) 421, on the intervention at 431 and 434 (C. C. A. 9), in which latter case the United States was a party as in the case at bar, and the Court said: "They assert, however, that they have no available remedy for the adjudication of title *because appellee (U. S.) has not consented to the bringing of a suit.* We believe and hold that the denial left the States no remedy to adjudicate the title to the island. The order denying the intervention was a practical denial of relief in that respect, and therefore the orders are appealable." (Italics supplied.)

The case at bar is "on all fours" with the case just quoted as far as the latter goes but in addition thereto the case at bar is a *special* and *specific statutory remedy* for the appellants provided by Congress and made *mandatory* by the use of the word "*shall*" (not just the word "may" which is only sometimes mandatory) and Congress *gave the consent* of the United States to be thus litigated therein.

The said Act of June 25, 1929, section 5, provides: "The attorney general is hereby authorized and *directed* forthwith to institute such suit * * * In the judicial proceedings contemplated in this act there *shall* be presented and the court or courts *shall consider and make findings* relating to and *determined* * * * including the legal effect of the foreclosure of any or all mortgages which the said Northern Pacific Railroad claims to have placed on said granted lands. * * * The said Northern Pacific Railroad Company or the Northern Pacific Railway Company or any other proper person *shall* be entitled to have heard and determined by the court all questions of law and fact and all other claims and matters which may be germane to a full and complete adjudication of the respective rights of the United States and said companies * * * and all other questions of law and fact presented to the Joint Congressional Committee * * * notwithstanding that such matters may not be speciafically mentioned in this enactment."

But a more pertinent decision as to the appellants' right to intervene in the present case could scarcely be found than that in *U. S.* vs. *Ladley,* 51 Fed. (2d) 756 (D. C. Idaho), a suit by the United States against a private individual to quiet title to property formerly the bed of a lake, title to which was claimed by the State of Idaho, where it was held: (1) that the state was a necessary party; (2) that its petition for leave to intervene should be granted; and (3) that the federal district court had jurisdiction notwithstanding the state's intervention as a necessary party. To quote from Judge Cavanah's opinion in that case: "The pleadings and the petition in intervention seem to agree that the main contest is between the United States and the state, as the only issue relating to their possession is whether the bed of the lake was navigable or nonnavigable. If the lake was nonnavigable, then the title of the state falls which carries with it the claim of the defendant who bases his claim upon the title of the state. So it is apparent that under Equity Rule 37, where the state is a necessary party and is permitted to intervene, which I think it has a right to and should be permitted to intervene, the court does not lose jurisdiction, because coming in voluntarily under that rule the state cannot object to the jurisdiction of the court. This construction of Equity Rule 37

and the state being a necessary party removes the objection as to the jurisdiction which might be made under Equity Rule 39. Of course the rights of all persons interested in the subject matter of the suit should be decided in the present litigation, and parties having an immediate interest in the subject ought to be made parties to the suit. The state is so situated in respect to this litigation that the court ought not to proceed in its absence, and, when brought in, the case would be between the United States on the one hand and the state on the other, with the defendant, one of the citizens of the state, contesting both the rights of the United States and the state. The interest of the state is of such a nature that a final decree could not be made in the action without affecting that interest, and it would be improper for a court of equity in the exercise of a fair discretion to proceed without it. *State of California* vs. *Southern Pacific Co.,* 157 U. S. 229, 15 S. Ct. 591, 39 L. Ed. 683; *New Mexico* vs. *Lane, et al.,* 243 U. S. 52, 37 S. Ct. 348, 61 L. Ed. 588; *Louisiana* vs. *Garfield,* 211 U. S. 70, 29 S. Ct. 31, 53 L. Ed. 92; *Percy Summer Club* vs. *Astle, et al.* (C. C.), 110 F. 486."

The Special Master under the decree of reference of May 24, 1932, stated in his report of May 31, 1933, which was confirmed by the decree of October 3, 1935, as amended January 29, 1936, five and one-half years after the suit was instituted, that "the Government neither by the bill nor in argument, is attempting to set aside the decrees of foreclosure or the sales had under those decrees".

The railway company had theretofore on January 18, 1932, forced the railroad company to "disclaim" any and all interest in the properties, assets and lands and on May 9, 1932, to file an answer adopting the answer of the railway company that the same belonged to the railway company.

The Attorney General in violation of his duty under the Act did not put the matters in issue required thereby and he assumed that the railway owned the property and prayed judgment in the bill against the railway and not against the railroad.

The appellants could not know until after the decree of January 29, 1936 (which lacked two days of being five

and one-half years after the bill was instituted), settling the pleadings whether or not the Attorney General would put the matters in issue and there was no occasion until then for the appellant railroad company, through minority stockholders, to file an answer or the intervening petitioners to file their petition.

Before the pending appeal was granted to the Intervening Petitioner, opposing counsel are attempted to draw a red herring across the trail seemingly in an effort to lead the Court to hear and determine on this application the questions that should be heard on the merits on the appeal after the appeal is allowed, which hearings should be in open court on oral argument, briefs and printed record with the opening and closing to the appellants, and the opposing counsel are not, as they should, restricting their argument solely to the question of whether or not an appeal is grantable. The plan opposing counsel was seeking to invoke and establish has never been authorized or approved by Congress or the Courts and we do not believe that this Court will now permit such proceedings, but as now one application for appeal has been granted, record printed and will be heard on oral argument with printed briefs, opposing counsel cannot object to the other as yet undetermined application being heard on same printed record, brief and oral arguments, and then granted and thereupon forthwith reversed or affirmed.

The Supreme Court of the United States has established the practice that where on motion to dismiss an appeal the Court feels that it might be well to consider the appeal on the merits before passing on the motion to dismiss or substantial jurisdiction, that it continue the hearing on the motion to dismiss until the hearing on the merits, thereby reserving to the appellant all the rights to a full oral hearing in Court on printed record and brief; then the Supreme Court has the record printed so that it will be available for the hearing on the question of jurisdiction as well as the merits.

We feel that this Court should certainly not permit itself on this application to be led to consider this appeal on the merits before granting appeal and then, in the event the Court should feel that the decrees appealed from should be affirmed and then deny the appeal and thereby cut appellants out of an opportunity or right to appeal to the Supreme Court of the United States on the merits as there would be no judgment of this Court, thus possibly burdening the Supreme Court with a petition for mandamus before there can be a petition for *certiorari.* This appeal should be granted and then either reversed or affirmed, and counsel are confident it should, and will, be reversed.

The "correct practice" is that the chancellor should "grant the appeal as a matter of course" where it is a question of whether the intervention is discretionary or mandatory, as was held in *United States* vs. *Phillips,* Ga. 107 Fed. 824 (C. C. A. 5), cited with approval by this Court in *Richfield Oil Company* vs. *Sawtelle, Judge,* above.

The above act shows clearly that Congress, after the decision in *United States* vs. *Northern Pacific Railway Company,* 256 U. S. 51, determined that the rights between the two companies should be settled by the Court in a proper suit and provided the remedy and the jurisdiction in Section 5 of the Act of June 25, 1929. And the Congress had, after the opinion of the Attorney General cited by the railway, passed the Act of July 1, 1898 (30 Stats. 620), holding that the questions were still open, which contained this provision: "And provided further, That nothing herein contained shall be construed as intended or having the effect to recognize the Northern Pacific Railway Company as the lawful successor of the Northern Pacific Railroad Company in the ownership of the lands granted by the United States to the Northern Pacific Railroad Company, under and by virtue of foreclosure proceedings against said Northern Pacific Railroad Company in the courts of the United States, but the legal question whether the said Northern Pacific Railway Company is such lawful successor of the said Northern Pacific Railroad Company, should the question be raised, shall be determined wholly without reference to the provisions of this act, and

nothing in this act shall be construed as enlarging the quantity of land which the said Northern Pacific Railroad Company is entitled to under laws heretofore enacted."

The appellant intervening petitioners and minority stockholders filing the answer and cross bill for the railroad company represent all of the stockholders of the Northern Pacific Railroad Company except the Northern Pacific Railway Company, which holds all the stock not held by the appellants and those associated with them. The interest of the appellants and those associated with them is worth some $3,000,000 to $4,000,000 and it is a very important matter, as evidenced by the fact that they began their efforts in 1898 or a little later to have a Congressional investigation of the foreclosure and mortgages of the Northern Pacific Railroad Company to obtain the evidence and the facts as to the foreclosures and mortgages and to obtain a statute similar to the one of June 25, 1929, in which the United States would be a party by its consent.

At every annual meeting from 1898 to and including 1937 these minority stockholders protested the wrongs done them and sought relief in such stockholders meetings, but all in vain.

In 1900 that distinguished Philadelphia attorney, the late John G. Johnson, Esq., filed a suit for one of those associated with these appellants in the United States Circuit Court for the Southern District of New York protesting the said foreclosures and mortgages and the rights of the minority stockholders and depositions were taken for some years, and that suit is still pending and on the docket, but it was known before the institution of the suit and realized during the pendency that there could not be the proper relief or a decision binding on all the parties and on the United States unless the United States was a party thereto.

Decisions of the Supreme Court cited in the answer and cross bill make it clear that no suit for the foreclosure, sale or conveyance of the railroad property and lands of the Northern Pacific Railroad Company could pass any

title or be valid and binding unless the United States was a party thereto.

Consequently, the appellants, intervening petitioners, and those associated with them again, as in 1898 or a little later, sought a Congressional investigation and they were persistently and continuously active and vigorous in seeking such investigation. Their effort was crowned with victory in 1924 and 1925 in obtaining the Joint Congressional investigation which resulted in the Act of June 25, 1929, and which investigation is referred to therein. But for such continued and faithful effort of the appellants that investigation and the resulting statute would never have been had. That statute and the report of the Committee show that Congress has given a mandate to the Attorney General and the Courts to find the facts and determine every issue or contention made before that Committee, whose hearings and Report consist of some 15 printed volumes of which this Court will take judicial notice.

In these hearings the railway company contended that the former opinions of the Attorney General and the case of *United States* vs. *Northern Pacific Railway,* 256 U. S. 51, settled the matter, but the Committee and the Congress determined otherwise. The statute established a special and specific jurisdiction and remedy, and provided that process could be sent to and served on parties in other districts than the one where the suit was instituted, and the statute restricted the district in which the suit could be instituted to certain districts in certain states traversed by the Northern Pacific (Sec. 7).

Congress made it mandatory that the Court make findings of fact on the validity and "legal effect of the foreclosure of any and all mortgages" and on all the other matters contested in the Congressional investigation, which included a dispute as to whether or not title could pass or had passed to the railway company.

Commissioner Graves, in his first report (R., 467), stated: "Thus the final decree may settle forever all dis-

putes which have existed up to the present time between the Government and the *railroad.*"

Then Congress required that the Attorney General make a report to Congress so that it would know how to legislate, Congress feeling, as its report and act indicate, that they wished a judicial determination of the disputes set out in the act and for a Court to determine whether or not the title was still in the railroad or had passed to the railway. Because this railway system is subject to special use of the United States for transporting the mail and troops, it was important for the Congress to know whether or not in the future it was dealing with the Federal corporation, the Northern Pacific Railroad Company, or the Wisconsin state corporation, the railway company.

The Attorney General, by failing to put the matters in issue, as the Master reported, and the railway company, by filing for the railroad the disclaimer and answer by the railroad company, are thus thwarting the purpose and intention of Congress.

The Joint Resolution Committee on April 29, 1929, reported to the first session of the Seventy-first Congress in Report No. 2 and stated: "Your committee reported to the Seventieth Congress, second session, a similar bill which, on February 21, 1929, was submitted to the Senate by Mr. Kendrick and to the House by Mr. Colton. The remarks of Mr. Colton made in the House in connection with the bill on March 2, 1929, which appear in the Congressional Record of March 12 (pp. 5294-5298) and March 15, 1929 (pp. 5431-5433), are, by reference, hereby incorporated in and made a part of this report. The committee unanimously recommends that the bill be passed."

* * * * *

"Extensive hearings have been had, at which representatives of the Department of Agriculture, the Department of Interior, and the Northern Pacific Railway Co. were present. The privilege of calling and examining witnesses and being heard in argument was extended *to all interested persons.* A numbr of witnesses have been called and examined and legal representatives of the governmental departments and of the company have been heard on the propositions of law and facts involved. Your committee

has made a detailed study of all the circumstances and facts connected with the points raised in this controversy and the law applicable thereto. Ninety-four days of hearings have been held and proceedings covering over 5,500 pages have been printed."

* * * * *

Note that there was no one representing the Northern Pacific Railroad Company at these hearings.

On page 5296 the committee stated: "That it is desirable that a speedy and final adjustment of the grants be had; *that the decision of the courts be obtained on the controverted questions of law and fact, and that the respective rights of the United States and the Northern Pacific Railroad Co. and/or its successor, the Northern Pacific Railway Co., be fully and finally established.*"

* * * * *

"The provisions of the bill may be summarized, in general, as follows: "By the first section all lands, surveyed, or unsurveyed, within the indemnity limits of the grants and within the exterior boundaries of national forest and other Government reservations are removed from the operation of the land grants and retained by the United States as part of the reservations *within which they are situate, relieved and freed from all claims, if any exist, which the Northern Pacific Railroad Co. or its successor, the Northern Pacific Railway Co.,* may have to acquire them as indemnity selections or otherwise, and provision is made that the railroad company or its successor shall be entitled to be *compensation* to the extent and in the amounts, if any, the courts hold compensation is due.

* * * * *

"Section 4 provides that the act shall not be construed as affecting the present title of the company or its successors *in the right of way,* acquired under the grants, or land actually used in good faith by the Northern Pacific Railway Co. in the operation of its road, such as lands used for depots, station buildings, work shops, machine shops, switches, side track, and water stations.

"Section 5 directs the Attorney General to institute proceedings to accomplish the objects mentioned therein and *in the act in its entirety.*

"Section 6 requires that an accounting be had and authorizes the rendering of such judgments and decrees as law and equity may require.

"Section 7 relates to the fixing of jurisdiction and to matters of procedure.

"Section 8 makes it the duty of the Attorney General to *report to Congress any final determinations rendered in the proceedings* and requires the Attorney General, the Secretary of the Interior, and the Secretary of Agriculture to submit to Congress such recommendations for the enactment of legislation, if any, as they deem desirable in the interests of the United States in connection with the execution of said judgments and decrees, or otherwise."

* * * * *

"Your committee is of the opinion that the grantee railroad company and its successor are not now entitled to the same compensation from the United States they would have been entitled to receive had they made a full and complete compliance with the obligations that were contained in the act of Juyl 2, 1864, and the resolution of May 1, 1870, and which the grantee railroad company obligated itself to perform.

"Likewise, your committee is of the opinion that the grantee railroad company or its successor should not now be permitted to profit under the land grants at the expense of the United States through transactions that were collusive, fraudulent or otherwise illegal. The testimony taken at the hearings shows that there were such transactions. Your committee is of the opinion that the grantee railroad company or its successor is not entitled to any further lands from the United States."

Again, on page 5297: "It was, therefore, the unanimous opinion of your committee that the enactment of H. R. 17212 is necessary for the proper protection of the interests of the United States. The bill if enacted will permit the United States to go into the courts on a comprehensive basis and at the same time it will *afford* the *grantee railroad company or its successor an opportunity to be fully heard* in support of *such contentions* as it may desire to *make in opposition to any position taken by the United States* in the court proceedings.

"Under the first section of H. R. 17212 the United States retains title to the lands within the national forests and other Government reservations that might be subject to acquisition by the Northern Pacific Railway Co., in the event it should be found that there is an unsatisfied deficiency in the acreage of the grants. The section removes these lands from the operation of the grants and provides

that the railroad company shall be entilted to compensation in the event the courts find that compensation is due from the United States. This action is taken under the power reserved by Congress to repeal, alter, or amend the grants."

This shows that the committee believed the statute gave the railroad company the right to make any contentions it wished in opposition to the position taken by the Government in the Court proceedings.

Therefore, the Attorney General having in this suit taken the position and assumed that the railway company has title to and owns all the rights of way, road bed, land, land grants, and assets of the Northern Pacific Railway system, and that the railroad company has no right, title or interest whatever therein, the railroad company under the committee's construction of the Act, is entitled to be heard in Court contesting the position thus taken by the Attorney General, which position of the Attorney General to any open mind is a clear and unjustified violation of the mandate of the statute addressed not only to the Attorney General but to the Courts.

The committee stated as one reason for declaring a forfeiture that: "(c) the collusive sales of the granted lands in violation of and in evasion of the provisions of the resolution of May 31, 1870, in connection with the foreclosure of the mortgages coincident with the 1875 and the 1896 reorganizations of the Northern Pacific Railroad Co.

The United States was not a party to any of these proceedings."

The appellants could not know until after the decree of January 29, 1936, five and one-half years after this suit was instituted, whether or not the Court would require the putting in issue of the matters made mandatory by the statute. The Act of June 25, 1929, by its terms eliminates all questions of laches, and furthermore, property of the railroad company never taken into possession by the railway is now in the Court in this cause, and the railroad can, and it is fighting to, prevent the railway from getting possession of same.

On April 13, 1938, the judge of the lower court had the clerk write counsel for the railroad company by, &c., and for the appellants, in reply to counsel's request that they be notified of the time of hearing on the decree and findings of facts that were to be presented, which letter of the clerk is as follows:

"Dear Mr. Hudson:

Your air mail letter of April 11, addressed to Judge Webster, came to hand in due time and because of his continued illness has been turned over to me for attention.

Judge Webster is still confined to his home and we do not know definitely at this time just when he will be able to resume his duties. He is improving and hopes to be on the Bench on Saturday, April 23.

He directs he to say that the only questions to be considered at the April 23 hearing is the propriety of granting your appeals in the present state of the record and, if any appeals are appropriate in the circumstances, the precise questions which your clients may be permitted to raise.

No decree pursuant to his rulings on exceptions to the special master's second report has been presented for his consideration and it is not his purpose to give consideration to the decree on April 23. A later date will be fixed for considering decree after the proposed decree has been presented to him, *of which date you will be seasonably advised.*

Respectfully,
A. A. LaFRAMBOISE, Clerk.

CC to Mr. Edmiston
Mr. Boylan"

Notwithstanding this promise from the Court, the decree of August 1, 1938 (R., 1256), was entered confirming a stipulation between the Government and the railway company that the Government might file an amendment to its amended Bill, which was made a part of the stipulation and notwithstanding the written promise of the Government that it would not be presented until counsel for the appellants (and when we say counsel for the appellants we mean the railroad company by &c., and the intervening petitioner) had an opportunity to oppose it and to be heard, the decree was entered before counsel for the appellants, re-

ceived a copy of the stipulation and amendment and had an opportunity to oppose same—the whys and wherefores of how it was thus entered are set out in the joint motion of the appellants and the Northern Pacific Railroad by &c., to strike same filed August 29, 1938 (R., 1258).

On September 3, 1938, the railroad company by &c., filed an answer and cross-bill (R., 1240) to the said amendment to the amended bill of the plaintiff, which was filed August 1, 1938, (R., 1251-2-3), in which their motion to strike out the said decree and stipulation and amendment to the amended bill were reserved and made a part thereof and the motion to dismiss the amended bill as well as the amendment. This answer and cross bill adopted as a part thereof the former answer and cross-bill and the intervening petition. The government having thus filed an amendment to its amended bill without having complied with the mandate of the said act of June 25, 1929, removes any question as to the right of any party in interest at this time to file a motion to dismiss, answer or cross-bill, as the pleadings have not been completed, and the cause has not been heard on the merits.

The cross bill (R., 952) and petition (R., 1037) allege facts and sustain them with exhibits clearly showing that the 1896 foreclosure is null and void, and no title ever passed to the railway, and they cite and quote therein decisions of the United States Supreme Court so holding. (R., 992, 997, 1097-8-9, 1117-21, 1124, 1127, 1130.)

The Railroad Company and the railway company contended from 1875 to 1924 that the foreclosure of 1875 was a valid foreclosure and passed title, but in 1924 they changed their position and admitted that there was no foreclosure or passing of title in 1875, but simply an exchange of securities. Because of the disputes and this change in the position of the railway, Congress in the Act required a finding of fact and determination by the Courts as to the validity of the so-called foreclosure of 1875, and would not accept the 1924 admission of the railway company that there was not a foreclosure.

The allegations in the cross bill and petition show that under the decisions of the Supreme Court of the United States, cited therein, the so-called foreclosure of 1896 was not a foreclosure, nor did any title pass, but it was merely an exchange of securities somewhat similar to 1875, and filed exhibits sustaining same.

The cross bill and petition allege facts, and sustain them with exhibits, clearly showing that the railroad company title could not pass from it and that the railway company could not take or receive title under the laws of the United States and of the different states involved, and cited and quoted decisions of the Supreme Court of the United States so holding. (R., 1097-8-9, 1116-21, 1124, 1127, 1130.)

The cross bill and petition further allege that the railway was owned by the railroad in 1896, and that the railway only took possession and did not take title to the railroad property and lands, that the mortgage of July 1, 1870, was not a lien on the roadbed and right of way, that all mortgages since 1870 are null and void and many other matters, and that the railway is simply a trustee, holding company, or operating company, for the railroad company, and cite and quote decisions of the Supreme Court of the United States so holding.

The cross bill and petition allege that the minority stockholders and intervening petitioners hold preferred stock of the railroad company, which is a debt as well as stock, and under the Boyd case the Supreme Court held as to them that the 1896 proceedings were void (R., 986-7).

If the said decrees mean and can only be construed to mean, as contended by the Government and by the railway company before the Supreme Court, that the appellants were put out of court by the District Court and are no longer parties thereto, then the decrees are clearly final decrees.

If the decrees mean and can only be construed to mean that the appellants were put out of court by the District Court as to part of their cause of action, that is, to obtain recovery of all the railroad property and assets, and were

only left in court as to the fund to be established by the lower court, if any, then the decrees are still final decrees.

But if the decrees mean that the District Court did not put these appellants out of Court on any matters but permitted them to remain in Court, and that if and when the fund is established then the Court shall determine all the causes of action and the title to and right of possession of all of the railroad property, lands and assets and forever settle the question of title and possession and make findings of fact as required by the Act, then it might be construed that the decrees are interlocutory.

Counsel do not think this latter proposition is a tenable position, because if no fund is established by the District Court, then it could be questionable whether or not the entire issue between the rialroad and the railway company could be heard in the suit still pending in the District Court.

For these reasons appellants feel that the two decrees are final decrees and this Court should grant the appeals and review and reverse the District Court and direct it to carry out the mandate of Congress requiring the District Court to settle all the disputes between the railroad and the railway company and make findings, as mandatorily required by the Act of June 25, 1929.

As alleged in the cross bill and petition, citing decisions of the Supreme Court to sustain same, there can be no valid binding suit or decree affecting the properties of the Northern Pacific Railroad system unless the United States is a party thereto and, as stated heretofore, appellants were fighting for over 25 years to obtain authority from Congress for such a suit consenting to the United States being a party thereto, and this suit is the result of such effort. (R., 1097, 997.)

As the United States is a party and this is the only suit that can determine the matter, and Congress made it mandatory to have a finding of fact and determination by the Courts as to the validity of the mortgages, the title and many other matters, including all the rights of these par-

ties, the said decrees striking the answer and the cross bill are each clearly final and appealable under the decisions of the Supreme Court of the United States and decisions of this Court, cited above, and other courts. In *United States* vs. *California Co-operative Canneries,* 279 U. S. at 556; 73 L. Ed. 841, the Court held and said: "It did not refer to the decisions which hold that an order denying leave to intervene is not appealable (citations) except where he who seeks to intervene has a direct and immediate interest in a *res* which is the subject of the suit (compare *French* vs. *Gapen,* 105 U. S. 509, 524-526, 26 L. Ed. 951, 956, 957; *Smith* v. *Gale,* 144 U. S. 509, 36 L. Ed. 521, 12 Sup. Ct. Rep. 674; *Leary* vs. *United States,* 224 U. S. 567; 56 L. ed. 859, 38 Sup. Ct. Rep. 599; *Swift* vs. *Black Panther Oil & Gas Co.,* 136 C. C. A. 448, 244 Fed. 20, 30)."

In *Credits Commutation Co.* vs. *United States,* 177 U. S. at 315, 44 L. ed. at 785, the Court stated and held: "It is doubtless true that cases may arise where the denial of the right of a third party to intervene therein would be a practical denial *of certain relief to which the intervener is fairly entitled, and which he can only obtain by intervention.*

* * * * * *

"In such cases an order denying leave to intervene is not discretionary with the chancellor, and will generally furnish the basis for an appeal, since it finally disposes of the intervener's claim by denying him all right to relief."

This case was cited and approved in the following cases:

Illinois Steel Co. vs. *Ramsey,* 176 Fed. 853 at 863, 100 C. C. A.—8 323, and *Western Union Telegraph Co.* vs. *United States & Mexican Trust Co.,* 221 Fed. 562, 137 C. C. A.—8 113, both holding claimant of lien on specific property in exclusive control of court has right to intervene and denial of petition therefor is reviewable; *Central Trust Co.* vs. *Chicago, etc., R. Co.,* 218 Fed. 336 at 339, 134 C. C. A.—2, 144, orders denying intervention of nondepositing bondholders in proceedings to foreclose mortgage on railway stock, which disposed of petitioner's claims, are final and appealable. In the instant case the non-depositing minor-

ity stockholders are attacking same after sale and under a special statute giving such authority, appellants having alleged and shown by exhibits that the sale was void and there was only an exchange of stock.

United States vs. *Northwestern Development Co.*, 203 Fed. 960 at 952, 122 C. C. A.—9 252, where petition in intervention was dismissed in final judgment in an action at law as not stating cause of action, judgment was reviewable on writ of error.

United States Trust Co. vs. *Chicago, etc, R Co.*, 188 Fed. 292 at 296, 110 C. C. A.—7 270, order denying petition to intervene where intervention was matter of right, held reviewable. This case cites *Minot* vs. *Martin,* 95 Fed. 734 (C. C. A.—3).

Washington vs. *United States,* above was cited and followed in *Carroll* vs. *New York Life Ins. Co.,* 94 F. (2d) 333, (C. C. A.—8).

The case cited by the railway attorneys, *O'Connell* vs. *Pacific, etc., Co.,* (C. C. A.—9) 19 F. (2d) 460, not only is a discussion of the merits and not proper here but the Court there also said there was no fraud or bad faith or conspiracy and that there was no statute on which to base the intervention like the statute here of June 25, 1929.

Another case cited, *Barcelоux* vs. *Buffam,* 51 F. (2d) 82, (C. C. A.—9 is not applicable, as the rights of the intervening petitioners, the Court states, were *"being actually litigated in good faith by the respondent corporation."* Also it was a case on the merits, as there was no question of an appeal raised; in the case at bar the rights of the appellants are not being litigated by either the Government or the railway company, but on the other hand, the railway company forced the abandonment of any rights of the railroad company or its stockholders by filing for it while in captivity, on January 18, 1932, a disclaimer as follows:

"DISCLAIMER OF NORTHERN PACIFIC RAILROAD COMPANY.

Defendant Northern Pacific Railroad Company, a corporation organized and existing under the provisions of the Act of July 2, 1864 (13 Stat. 365) says that it does not claim or pretend to have any right, title or interest in the subject matter of this suit as set forth in the original bill of complaint as amended, or any part thereof, and this defendant disclaims any right, title or interest in said subject matter and every part thereof.

Wherefore this defendant prays that the original bill of complaint as amended be dismissed as to it."

The railway company likewise holding the railroad company in captivity, had filed for the railroad company through the railway attorneys on May 9, 1932, an answer as follows, which was really an answer to the amended bill: "Now comes the defendant Northern Pacific Railroad Company, a corporation, and for its answer to the bill of complaint says: "It admits that it is a federal corporation, organized and existing under the provisions of the Act of July 2, 1864 (13 Stat. 365), and has an office in the City of New York. Denies that it is engaged in business.

"Defendant abides by, adopts and makes a part of this answer the amended and supplemental answer filed herein by defendant Northern Pacific Railway Company."

The railway company's amended and supplemental answer claims to own all the lands and property or that they are owned by other corporations, all the stock of which the railway company owned, and then the answer prayed: "That the court determine the compensation due to the Northern Pacific Railway Company for the lands expropriated by the United States by the Act of June 25, 1929, and enter its decree in favor of this defendant for the sum so found, together with interest thereon from the 25th day of June, 1929. Defendant further prays that the court dismiss the bill of complaint as to all other matters therein set forth."

It was not necessary for appellants nor for any minority stockholders to obtain leave to file an answer and cross bill; a cross bill can be filed by the minority stockholders just the same as they can file an original bill where the corporation is not protecting its rights. This seems clear

from the principles enunciated in *Ashwander* vs. *TVA,* 297 U. S. 288, 80 L. ed. 688, where the Court stated: "Plaintiffs *sue in the right* of the *Alabama Power Company.* They sought unsuccessfully to have that right asserted by the power company itself and upon showing their demand and its refusal they complied with the applicable rule." (Italics supplied.)

In *Carter* vs. *Carter Coal Company,* 298 U. S. 228 at 286; 80 L. ed. 1160 at 1177, the Court held and said: "First In the Carter Case (Nos. 636 and 651) the stockholders who brought the suit had formally demanded of the board of directors that the company should not join the code, should refuse to pay the tax fixed by the act, and should bring appropriate judicial proceedings to prevent an unconstitutional and improper diversion of the assets of the company and have determined the liability of the company under the act. The board considered the demand, determined that, while it believed the act to be unconstitutional and economically unsound and that it would adversely affect the business of the company if accepted, nevertheless it should accept the code provided for by the act because the penalty in the form of a 15% tax on its gross sales would be seriously injurious and might result in bankruptcy. This action of the board was approved by a majority of the shareholders at a special meeting called for the purpose of considering it."

* * * * * *

"The right of stockholders to bring such suits under the circumstances disclosed is settled by the recent decision of this court in *Ashwander* vs. *Tennessee Valley Authority,* 297 U. S. 288, 80 L. ed. 688, 56 S. Ct. 466 (February 17, 1936), and *requires no further discussion.*" (Italics supplied.)

Thus the Supreme Court *foreclosed* any further contentions against the right of Minority stockholders to file a suit (which includes a cross bill) *"in the* right of the" Corporation, as appellant did in the present answer and cross bill.

There is nothing in the books or cases distinguishing the right for such stockholders to file a cross bill from the right to file an original bill.

The Court recognized the appellants as parties by

denying, (which goes to the merits) and not striking out, the motion to dismiss the bill because it did not comply with the statute, and also denying and not striking out, appellant's motions to construe and amend the Master's Report to determine the ownership of the property. The Government's brief, page 10, sets out part of the order and a statement of Judge Webster on April 30, 1938 as follows: "And that counsel presenting said petition for appeal are not authorized to represent said Northern Pacific Railroad Company or any other party to this suit."

This is certainly final and appealable as denying all rights of appellants. This is Judge Webster's construction of his own decrees of March 9 and 22, 1938, and the Government and railway are estopped to deny same, as they asked for and prepared the decrees.

As the cross bill and petition to intervene were signed and sworn to by one of the minority stockholders, it cannot be said that counsel were not authorized by the appellants to file same nor is there anything in the record elsewhere to justify such a statement by the Court either as to the authority of counsel or of the appellants, and it indicates the state of mind as well as mental attitude or antipathy of the lower court to the appellants and their duly chosen counsel. Under *Ashwander* vs. *TVA,* above there can be no question of the authority of Minority stockholders of the Railroad Company for filing the cross bill as well as the intervening petition.

In Paragraph 2, page 10, of the Government's brief, it is stated that the decree of April 30, 1938, was not disclosed to the Supreme Court. The statement is incorrect and utterly absurd. The Court was fully advised of it; it was discussed by counsel for the Government and the appellants with the law clerk of the Chief Justice, who was getting information for the Chief Justice, and who indicated that if the appeals were not allowable, then the order of March 23, 1938, was void and could be stricken at any time, and it was needless to discuss the decree of April 30, 1938. But that decree was presented in appellant's peti-

tion for appeal to the Supreme Court, and in the railway company's brief.

The statement on page 17 of the Government's brief that there is no contention that the railroad and railway companies are not adequately presenting their claims against the Government is incorrect, as the contention was made vigorously in the Supreme Court and is shown by the record and will be made in this Court.

The action of the railway company through its attorneys by having entered the decree of August 1, 1938 (R., 1256), as set out in the motion of the Northern Pacific Railroad Company by minority stockholders and by the intervening petitioners filed August 29, 1938 (R., 1258), indicates a determined effort of the railway company to thwart the railroad company as well as the minority stockholders, and deprive both of their rights, and to continue the captivity of the railroad company and take all the profits for the railway company by stipulation and decree with the Government, which pretends to recognize all the right and property as being in the railway company and none in the railroad company. Thus the railway company and the United States are undertaking, by agreement, without the consent of the railroad company, to determine the ownership of the railroad, the lands and all the properties and rights of the railroad company under the grant and those otherwise obtained, to be the property of the railway company and thus not permit the Court to make a finding of fact or determination as to same as required by the act.

On the same page of the same brief it is stated that there is no reason given for the necessity of the United States being a party. That statement is incorrect, for the necessity therefor is fully set out in the record and heretofore and hereafter in this brief.

The statement on page 16 of the Government's brief as to contentions being ridiculous is without any merit, as the decree of March 22, 1938, modified the decree of March 9, 1938, and the cases heretofore cited clearly hold that minority stockholders are proper parties and the judge, in his decrees denying the motions, made them parties.

The Government urges on pages 1, 16 and 22 of its brief, and the railway company in its brief urges, that

these appeals not be granted as it would be inexpedient. This Court in cases heretofore cited, as well as the Supreme Court, has held that if the Court has jurisdiction the appeal is a matter of right and expediency can have nothing to do with it. No *supersedeas* has been or will be asked for on these appeals and as long as there is not a *supersedeas,* the appeal cannot and will not in any way interfere with the lower court in proceeding with the matters before it, nor will it in any way interfere with the appeal that the Government and the railway state they will take to the Supreme Court of the United States, which appeal appellants think has been lost by the carelessness of the railway company, as no appeal was taken within 60 days from March 22, 1938, as required by the Act of May 22, 1936. Council do not see that the case of *Century Indemnity Co.* vs. *Nelson,* 82 L. ed. 535, will save the appeal.

On page 11 of the Government's brief the statement is made that the appellants did not ask Judge Webster for an appeal from the decree of March 9, 1938 (R., ...), which statement is absolutely contrary to the truth and fact, as the petition to Judge Webster, filed May 24, 1938, prays an appeal from that decree; a copy of the petition which shows the same on page 1 was in the record presented to Judge Wilkins (This petition is in the record, as is also the decree of April 30, 1938, but they are not printed.)

Opposing briefs are more in the nature of a plea for mercy rather than a calm judicial discussion of this Court's jurisdiction in the instant case.

In *Alaska Packers Association* vs. *Pillsbury,* 301 U. S. 174 at 177; 81 L. ed. at 989, the Court said: "While an appeal in a proper case is a matter of right the question of whether the case is a proper one under the law regulating appeals is not to be left to the appellant but is to be examined and primarily determined by the Court or judge to which the application is made."

Nor is it left to the appellees. But this Court will determine from the Act of June 25, 1929, and the appeal stat-

ute, U. S. Code Title 28, section 225, and the former decisions of this Court and of other courts cited herein as a matter of law whether or not the appellants are entitled to the appeals prayed for.

This Court in *Washington* vs. *United States* above stated at page 435: "We conclude that the states are *without remedy* to *litigate* title to the island *against* the *United States*, and therefore the orders denying intervention to the states were final orders and appealable. We further conclude in reviewing the action of the court in disposing of the rights of the states to intervene, that the court erred in denying leave to intervene for the following reasons: (1) That the states are without remedy to litigate title to the subject of the suit, if intervention is denied; (2) that each state claims 'an interest in the litigation;' and (3) that the intervention will 'be in subordination to, and in recognition of, the propriety of the main proceeding,' under either construction of that language. Because of these reasons, the states have shown an absolute right to intervene, and the trial court had no discretion in regard thereto."

Counsel feel confident that the Court will be constrained to grant an appeal to the Northern Pacific Railroad Company by Schmidt and other minority stockholders to each of the following decrees entered by the District Court on May 24, 1932, October 3, 1935, the decree amending same on January 29, 1936, March 9, 1938, and the two decrees on March 22, 1938.

Respectfully submitted,

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CHAPTER 191.

An Act relating to railroads and amendatory of section 1833 of the Wisconsin statutes for the year 1898.

Section 1. Section 1833 of the Statutes of 1898 is hereby amended by adding after the word "operate" on the 13th line of said section on page 1352 of the Statutes of 1898 the following: "Any corporation taking any such conveyance or lease shall have all the rights, privileges and

immunities and be subject to all the duties, restrictions, of the corporation making such lease or conveyance", so that said section when so amended shall read as follows:

Section 1833. Any railroad corporation organized and existing under the laws of the territory or state of Wisconsin, or existing by consolidation of different railway companies under said laws, and the laws of any other territory or territories, state or states, may consolidate its stock, franchises and property with any other railroad corporation, whether within or without the state, when their respective railroads can be lawfully connected and operated together, to constitute one continuous main line, with or without branches, upon *suc* terms as may be agreed upon and become one corporation by any name selected, which within this state shall possess all the powers, franchises and immunities, including the right of further consolidations with other corporations under this section, and be subject to all the liabilities and restrictions of this chapter, and such in addition, including land grants and exemptions of land from taxation as such corporations peculiarly possessed or were subject to at the time of consolidation or amalgamation by the laws then in force applicable to them or either of them. Articles stating the terms of consolidation shall be approved by each corporation, by a vote of the stockholders owning a majority of the stock in person or by proxy, at either a regular annual meeting thereof or a special meeting called for that purpose in the manner prescribed by section 1826 or by the consent in writing of such stockholders annexed to such articles; and a copy thereof, with a copy of the records of such approval, or such consent, and accompanied by lists of their stockholders, and the number of shares held by each, duly certified by their respective presidents and secretaries, with the respective corporate seals of such corporations affixed, shall be filed for record in the office of the secretary of state before any such consolidation shall have validity or effect. Any such railroad corporation may give or take a lease, or may sell to or purchase from any railroad company, or at any judicial sale within or without the state, and give or take a conveyance or assignment of the railroad, franchises, and immunities together with the appurtenances and all other property, and the stock or bonds or both thereof, of any railroad corporation, whether organized or created by the laws of this state or any other state or of the United States, or any portion thereof, within or without this state, when

their respective railroads can be lawfully connected and operated together, to constitute one continuous main line, or when the road so purchased or leased will constitute a branch or feeder of or be connected with or intersected by any line maintained or operated by such purchasing or leasing corporation, or which said purchasing or leasing corporation is authorized to build, own, maintain and operate. Any railroad corporation existing under the laws of this state may purchase and hold the stock or bonds of any other railroad corporation described in this section or many purchase and hold the stock or bonds of any railway company to which it was furnished the money for the construction of its railway, for the money so furnished, or for such other consideration as may be agreed upon between the companies by their respective boards of directors, it may purchase and may take a conveyance of the whole or any portion of the franchises of any such corporation, and of the railway property and appurtenances thereof, any stock or bonds which shall have been issued by any purchasing corporation in consideration of any property by it purchased as authorized by this section shall be deemed fully paid. All acts, purchases, whether at judicial sale or otherwise, and conveyancies heretofore or hereafter made by or to any railway company organized under the laws of this state, which are authorized by this section, and all conditions and agreements upon which the stocks and bonds of any such corporation have been and are to be issued, including any and all terms and conditions as to price, voting power, dividends and trustees, or otherwise and any between different classes of stock or otherwise and all issues of stock and bonds in accordance with such terms, conditions and agreements, are hereby in all things legalized, ratified, and confirmed; provided, that nothing herein contained shall be construed to legalize any contract of lease heretofore entered into between a corporation of this state and any corporation organized or created by the laws of the United States. But no railroad corporation shall consolidate with, or lease or purchase, or in any way become owner of, or control any other railroad corporation, or any stock, franchises, rights, or property thereof, which owns or controls a parallel and competing railroad to and with the railroad owned and controlled by such purchasing railroad corporation to be determined by jury.

Section 2. This act shall take effect and be in force

from and after its passage and publication. Approved April 18, 1899.

Chapter 198—Page 306, April 18, 1899.

An act relating to corporations and amendatory of Section 1788 of the Wisconsin statutes for the year 1898.

Section 1—Section 1788, of the Wisconsin statutes is hereby amended so as to read as follows: Purchasers of corporate rights may re-organize. Section 1788. Any person or association of persons, which shall have or may hereafter, become the owner or assignee of the rights, powers, privileges and franchises of any corporation created or organized by or under any law of this state, by purchase under a mortgage sale, sale in bankrupt proceedings, or sale under any judgment, order, decree, or proceedings of any court in this state, including the courts of the United States sitting herein, may, at any time within two years after such purchase or assignment, organize anew by filing articles of organization as provided in this chapter or elsewhere in these statutes respecting corporations for similar purposes, and thereupon shall have the rights, privileges and franchises which corporation had, or was entitled to have, at the time of such purchase and sale, and such as are provided by these statutes applicable thereto. They may fix at what price, or for what number of shares, the rights, privileges, powers, franchises and property of such former corporation purchased by them shall be put into the new organization.

"Any railroad corporation existing under the laws of this state, with the authority or the approval of the holders of a majority of the shares of its capital stock given either in writing or at a meeting called for that purpose, may purchase any railroad and other property, franchises, rights and immunities, in this or any other state or states, of any insolvent railroad corporation whose railroad shall be sold at morggage sale, or in bankruptcy or upon any other judicial sale, provided that the railroad so purchased shall not be parallel or competing with any constructed railroad owned or controlled and operated by the purchasing corporation, and shall be a continuation of, or be connected with, or intersected by, a line of railroad owned, leased or operated by such purchasing corporation, or which it shall be authorized to build; and in consideration of such railroad and other property, franchises, rights and immunities, so purchased, any such purchasing railroad

corporation may issue and deliver its own bonds and shares of its capital stock, *in such amounts* and at such prices, and on such terms and conditions, including any terms and conditions as to voting power and dividends in respect of any such stock as shall be so approved by the holders of a majority of the stock of such purchasing railroad corporation; and any and all purchases, and issues of stock and of bonds such as are authorized by this act, heretofore made by any railroad corporation existing under the laws of this state are hereby legalized and confirmed."

In *Ritchie* vs. *Sayers,* 100 Fed. 521 (D. C.—W. Va.) the Court held where the statute expressly provides "that no sale of real estate attached shall be made until the plaintiff, or some one for him, shall give bond with sufficient security, in such penalty as the court shall approve, with conditions," etc.) Code W. Va. 1868, c. 106, paragraph 23), a sale of real estate without such bond being given or required to be given will not only be made without authority from the statute, but against the express and positive command of it, and will confer no title upon the purchaser.

Although a court may have jurisdiction of a case, yet, if it appears from the record that it did not have jurisdiction to enter the decree and the particular judgment thereon that it did enter, then that decree and judgment may be collaterally impeached.

And the Court said "It has been repeatedly held that a judgment of a court of competent jurisdiction, rendered without authority of law, is a nullity. *City of Chrleston* vs. *Boller*, 45 W. Va. 44, 30 S. E. 152; *Norfolk & W. Ry. Co* vs. *Pinnacle Coal Co.*, 44 W. Va. 574, 30 S. E. 196, 41 L. R. A. 414; *Wilkinson* vs. *Hoke*, 39 W. Va. 403, 19 S. E. 520; *Manufacturing Co.* vs. *Carroll*, 30 W. Va. 532, 4 S. E. 782; *West* vs. *Ferguson,* 16 Grat. 270; *Styles* vs. *Coal Co.,* 45 W. Va. 374, 32 S. E. 227."

* * * * * *

"The whole scheme and object of the bill is to attach those deeds, claiming that they are fraudulent and void, and for this reason it is not a collateral attack, but a direct effort upon the part of the plaintiffs in this action to vacate those deeds; but, even if it were an attack upon the proceeedings of the court, 'it is an axiom of the law that judgments entered without any jurisdiction are void, and will be so held in a collateral proceeding,' as stated by the American and English Encyclopedia of Law (Volume 12, p. 147);

and this authority says that it is hornbook law, and cites a number of cases, both English and American, in support of this position.

In the case of *Risley* vs. *Bank,* 83 N. Y. 318, the court held that where a court was authorized by a statute to entertain jurisdiction in a particular case only, and undertakes to exercise the power conferred in a case to which the statute has no application, it acquires no jurisdiction, and its judgment is a nullity and will be so treated when it comes in question, and can be attacked either directly or collaterally.

In the case of *Paul* vs. *Willis,* 69 Tex. 261, 7 S. W. 357, the court holds that a void judgment is always subject to collateral attack, and it can derive no legal sanction, even from the lapse of time."

* * * * * *

"It is a well-settled principle that, although a court may have jurisdiction of a case, yet, if it appears from the record that it did not have jurisdiction to enter the decree and the particular judgment thereon that it did enter, then that decree and judgment may be collaterally impeached. *United States* vs. *Walker,* 109 U. S. 258, 3 Sup, Ct. 277, 27 L. Ed. 927; *Ex parte* Nielson, 131 U. S. 176, 9 Sup. Ct. 672, 33 L. Ed. 118; *Ex parte* Cuddy, 131 U. S. 280, 9 Sup. Ct. 703, 33 L. Ed. 154; *Lewis* vs. *Allred,* 57 Ala. 628; *Folger* vs. *Insurance Co.,* 99 Mass. 267; *Fithian* vs. *Monks,* 43 Mo. 502; *Seamster* vs. *Blackstock,* 83 Va. 232, 2 S. E. 36; *Anthony* vs. *Kasey,* 83 Va. 338, 5 S. E. 176."

In holding that the United States circuit court could make no decree in a suit in the absence of a party whose rights must necessarily be affected thereby, the court said in *Gregory* vs. *Stetson,* 133 U. S. 579, 586, 33 L. Ed. 792. (The Rule as to who *shall be* made parties to a suit in equity is thus stated in Story's Equity Pleading, Section 72): 'It is a general rule in equity (subject to certain exceptions, which will hereafter be noticed) that all persons materially interested, either legally or beneficially, in the subject matter of a suit are to be made parties to it, either as plaintiffs or as defendants, however numerous they may be, so that there may be a complete decree, which shall bind them all. By this means, the court is enabled to make a complete decree between the parties, *to prevent future litigation by taking away the necessity of a multiplicity of suits, and to make it perfectly certain that no injustice is done,* either to the parties before it, or to others, who are

interested in the subject matter, by a decree, which might otherwise be grounded upon a partial view only of the real merits. When all the parties are before the court, the whole case may be seen; but is may not, where all the conflicting interests are not brought out upon the pleadings by the original parties thereto.' See also 1 Daniell's Ch. Pl. and Pr. 246 *et seq.*''

'* * * It is an elementary principle that a court cannot adjudicate directly upon a person's right without having him either actually or constructively before it. This principle is fundamental.'

* * * * * *

'The point was made in the court below, and it is also pressed here, that, Mrs. Pike being a nonresident and beyond the jurisdiction of the court, it was impossible to join her as a party defendant to this suit, and that it was therefore unnecessary to attempt to do so. The court below ruled against the complainant on this point, and we see no error in that ruling. The general question involved therein has been before this court a number of times, and it is now well settled that, notwithstanding the Statute referred to and the 47th Equity Rule, a circuit court can make no decree in a suit in the absence of a party whose rights must necessarily be affected thereby. *Shields* vs. *Barrow,* 58 U. S. 17 How. 130, 141, 142, (15: 158, 162); *Coiron* vs. *Millaudon,* 60 U. S. 19 How. 113, 115 (15:575) and cases there cited.

'But even admitting the complainant's contention as regards the making of Mrs. Pike a party to this suit, it does not follow that Talbot and Brooks should not have been made parties. As we have shown, they had a substantial interest in the subject matter of the contract sued on, and they should have been made parties to the suit'

In the Rose's Notes, page 1081, listing cases following above decision it is stated: ''*United States* vs. *Northern Pac. R. Co.,* 134 Fed. 720, 67 C. C. A. 269, dismissing bill by United States to annul contract between certain corporations, where one of them not inhabitant of district where suit brought.''

California vs. *Southern Pacific Co.,* 157 U. S. 229; 39 L. ed. 683, was a suit brought by California as complainant, directly in the United States Supreme Court against the Southern Pacific Company as defendant, wherein complainant prayed as here that it be adjudged the owner of the premises, etc. It appeared from the proceedings that the

city of Oakland and the Oakland Water Front Company claimed title to property not directly in the litigation, but which they claimed through the same original grant as that through which the defendant claimed title, but were not joined as parties defendant. The court held that such city and corporation were so situated in respect of the litigation, that the court ought not to proceed in their absence; and as, if they were brought in, the case would then be between the State of California, on the one hand, and a citizen of another state and citizens of California on the other, the court could not, under such circumstances, take original jurisdiction of it.

It was held:

"1. A court cannot adjudicate directly upon a party's right, without the party being actually or constructively before the court.

"3. In a suit in equity in this court, by the state of California against the Southern Pacific Company, a corporation and citizen of Kentucky, for a decree that the state is the owner of all the Oakland water front and that the defendant has no estate or interest therein and that the town of Oakland had no authority to grant or convey the same, the city of Oakland, the successor of the town of Oakland and the Oakland Water Front Company are necessary and indispensable parties.

"4. Where there are indispensable parties that are not made parties to a suit in equity in this court and the making them parties would oust its jurisdiction, the suit will be dismissed for want of such parties who should be joined but cannot be without ousting the jurisdiction."

The Court said:

"And if the proceedings which purported to vest title in the Oakland Water Front Company were held ineffectual for the same reason, then the latter company would find the foundation of its title swept away in a suit to which it also was not a party."

If the 1896 suits were valid then the rights of the United States in all the unsurveyed and unpatented lands that the Railroad Co. was entitled to under the grants were "swept away" by the foreclosure decrees.

"This is not an action of ejectment or of trespass *quare clausum*, but a bill in equity, and the familiar rule in equity, as we have seen, is the doing of complete justice by deciding upon and settling the rights of all persons

materially interested in the subject of the suit, to which end such persons should be made parties."

"We are constrained to conclude that the city of Oakland and the Oakland Water Front Company are so situated in respect of this litigation that we ought not to proceed in their absence."

The Court also said at page 695: "It was held at an early day that Congress could neither enlarge nor restrict the original jurisdiction of this court (*Marbury* vs. *Madison*, 5 U. S. 1 Cranch, 137, 173, 174 (2:60, 72)) and no attempt to do so is suggested here. The jurisdiction is limited and manifestly intended to be sparingly exercised, and should not be expanded by construction. What Congress may have power to do in relation to the jurisdiction of circuit courts of the United States is not the question, but, whether, where the Constitution provides that this court shall have original jurisdiction in case in which the state is plaintiff and citizens of another state defendants, that jurisdiction can be held to embrace a suit between a state and citizens of another state and of the same state. We are of opinion that our original jurisdiction cannot be thus extended, and that the bill must be dismissed for want of parties who should be joined, but cannot be without ousting the jurisdiction. Bill dismissed."

In *Carroll* vs. *N. Y. Life Ins. Co.*, 94 F. (20) 333 (C. C. A. 8), a suit was brought by the Insurance Company to cancel the reinstatement of an Insurance policy (after it had lapsed because of non-payment of premium) due to false rpresentations in the application for reinstatement.

Deceased attempted to change the beneficiary from his estate to his wife after the reinstatement and also after notice by the company that they cancelled the reinstatement. Wife was co-executor of estate with another, and so was a beneficiary under the original provision of the policy, and the *sole* beneficiary under the change if it were effective.

Company didn't make wife a party defendant in her individual right and it is upon this ground that judgment for the company is appealed from.

Decision reversed, court citing *State of Washington* vs. *United States*, 87 F. (2d) 421 (C. C. A. 9), and other cases and saying: "Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that

its final termination may be wholly inconsistent with equity and good conscience", and held that where a person has an interest "of a nature such that a final decree could not be made without affecting that interest and perhaps not without leaving the controversy in a condition wholly inconsistent with that equity which seeks to put an end to litigation by doing complete and final justice", such person is to be regarded as an indispensable party "within the quoted long-established rule".

In *Eastern Transp. Co.* vs. *United States*, 272 U. S. 665; 71 L. Ed. 472, at 475, the Court said:

"The sovereignty of the United States raises a presumption against its suability, unless it is clearly shown; nor should a court enlarge its liability to suit conferred beyond what the language requires. It was this view which led us in *Blamburg Bros.* vs. *United States,* 260 U. S. 452, 67 L. Ed. 346, 43 Sup. Ct. Rep. 179, to hold that as the substitution by the Suits in Admiralty Act was merely to furnish a balancing consideration for the immunity of the United States from seizure of its vessels employed as merchant vessels previously permitted, the act did not apply in cases in which the seizure of a merchant vessel of the United States could not be prevented by the act in a foreign port and court where the immunity declared by Congress could not be given effect."

In *Reid* vs. *United States,* 211 U. S. 529; 53 L. Ed. 313 at 315, the Court said:

"Suits against the United States can be maintained, of course, only by permission of the United States, and in the manner and subject to the restrictions that it may see fit to impose. *Kawananakoa* vs. *Polyblank,* 205 U. S. 349, 353, 51 L. Ed. 834, 836, 27 Sup. Ct. Rep. 526. It has given a restricted permission, and has created a pattern jurisdiction in the court of claims, with a limited appeal. The right to take up cases from that court by writ of error still is limited as heretofore. It would not be expected that a different rule would be laid down for other courts that, for convenience, are allowed to take its place, when originally the rule was the same. It does not seem to us that Congress has done so unlikely a thing."

In *Choctaw Nation* vs. *United States,* 119 U. S. 1, 30 L. Ed. 306 at 314, the Court said:

"In reviewing the controversy between the parties presented by this record, it is important and necessary to consider and dispose of some preliminary questions. The first

relates to the character of the parties, and the nature of the relation they sustain to each other. The United States is a sovereign Nation, not suable in any court except by its own consent, and upon such terms and conditions as may accompany that consent, and is not subject to any municipal law. Its Government is limited only by its own Constitution, and the Nation is subject to no law but the law of nations. On the other hand, the Choctaw Nation falls within the description in the terms of our Constitution, not of an independent State or sovereign Nation, but of an Indian tribe. As such, it stands in a peculiar relation to the United States. It was capable under the terms of the Constitution of entering into treaty relations with the Government of the United States, although, from the nature of the case, subject to the power and authority of the laws of the United States when Congress should choose, as it did determine in the Act of March 3, 1871, embodied in Section 2079 of the Revised Statutes, to exert its legislative power.

As was said by this court recently in the case of the *United States* against *Kagama,* 118 U. S. 375, 383 (*ante,* 228): "These Indian Tribes are the wards of the Nation; they are communities dependent on the United States; dependent largely for their daily food; dependent for their political rights. They owe no allegiance to the States and receive from them no protection; because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive, by Congress, and by this this court, whenever the question has arisen."

It had accordingly been said in the case of *Worcester* vs. *Georgia,* 6 Peters 582 (31 U. S. bk. 8, L. Ed. 508): "The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import as connected with the tenor of the treaty, they should be considered as used only in the latter sense. * * * How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction."

The recognized relation between the parties to this

controversy, therefore, is that between a superior and an inferior, whereby the latter is placed under the care and control of the former, and which, while it authorizes the adoption on the part of the United States of such policy as their own public interests may dictate, recognizes, on the other hand, such an interpretation of their acts and promises as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection. The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right, without regard to technical rules framed under a system of municipal jurisprudence, formulating the rights and obligations of private persons, equally subject to the same laws.

The rules to be applied in the present case are those which govern public treaties, which, even in case of controversies between nations equally independent, are not to be read as rigidly as documents between private persons governed by a system of technical law, but in the light of that larger reason which constitutes the spirit of the law of nations. And it is the treaties made between the United States and the Choctaw Nation, holding such a relation, the assumptions of fact and of right which they presuppose, the acts and conduct of the parties under them, which constitute the material for settling the controversies which have arisen under them. The rule of interpretation already stated, as arising out of the nature and relation of the parties, is sanctioned and adopted by the express terms of the treaties themselves. In the eleventh article of the Treaty of 1855, the Government of the United States expresses itself as being desirous that the rights and claims of the Choctaw People against the United States "shall receive a just, fair and liberal consideration".

In *Den* vs. *The Hoboken Land & Improvement Co.*, 59 U. S. 272; 15 L. Ed. 372 at 377, the Court said:

"At the same time there can be no doubt that the mere question whether a Collector of the Customs is indebted to the United States, may be one of judicial cognizance. It is competent for the United States to sue any of its debtors in a court of law. It is equally clear that the United States may consent to be sued, and may yield this consent upon such terms and under such restrictions as it may think just. Though both the marshal and the government are exempt from suit, for anything done by the

former in obedience to legal process, still Congress may provide by law that both, or either, shall, in a particular class of cases, and under such restrictions as they may think proper to impose, come into a court of law or equity and abide by its determination. The United States may thus place the government upon the same ground which is occupied by private persons who proceed to take extrajudicial remedies for their wrongs, and they may do to such extent, and with such restrictions, as may be thought fit.

When, therefore, the Act of 1820 enacts, that after the levy of the distress warrant has been begun the Collector may bring before a district court the question, whether he is indebted as recited in the warrant, it simply waives a privilege which belongs to the government, and consents to make the legality of its future procedings dependent on th judgment of the court; as we have already stated in case of a private person, every fact upon which the legality of the extrajudicial remedy depends may be drawn in question by a suit against him. The United States consents that this fact of indebedteness may be drawn in question by a suit against them. Though they might have withheld their consent, we think that, by granting it, nothing which may not be a subject of judicial cognizance is brought before the court.

The Charles River Bridge vs. *The Warren Bridge, et al.,* 36 U. S. 11; 9 L. Ed. 773 at 823.

This brings us to the Act of the Legislature of Massachusetts of 1785, by which the plaintiffs were incorporated by the name of "The Proprietors of the Charles River Bridge"; and it is here and in the law of 1792, prolonging their charter, that we must look for the extent and nature of the franchise conferred upon the plaintiffs.

Much has been said in the argument of the principles of construction by which this law is to be expounded, and what undertakings, on the part of the State, may be implied. The court thinks there can be no serious difficulty on that head. It is the grant of certain franchises by the public to a private corporation, and in a matter where the public interest is concerned. The rule of construction in such cases is well settled, both in England, and by the decisions of our own tribunals. In 2 Barn. & Adol. 793, in the case of *The Proprietors of the Stourbridge Canal* vs. *Wheely, et al.,* the court says, "the canal having been made under an act of Parliament, the rights of the plaintiffs are

derived entirely from that act. This, like many other cases, is a bargain between a company of adventurers and the public, the terms of which are expressed in the statute; and the rule of construction in all such cases, is now fully established to be this—that any ambiguity in the terms of the contract, must operate against the adventurers, and in favor of the public, and the plaintiffs can claim nothing that is not clearly given them by the act". And the doctrine thus laid down is abundantly sustained by the authorities referred to in this decision. The case itself was as strong a one as could well be imagined for giving to the canal company, by implication, a right to the tolls they demanded. Their canal had been used by the defendants, to a very considerable extent, in transporting large quantities of coal. The rights of all persons to navigate the canal, were expressly secured by the act of Parliament; so that the company could not prevent them from using it, and the toll demanded was admitted to be reasonable. Yet, as they only used one of the levels of the canal, and did not pass through the locks; and the statute, in giving the right to exact toll, had given it for articles which passed "through any one or more of the docks", and had said nothing as to toll for navigating one of the levels; the court held that the right to demand toll, in the latter case, could not be implied, and that the company were not entitled to recover it. This was a fair case for an equitable construction of the act of incorporation, and for an implied grant, if such rule of construction could ever be permitted in a law of that description. For the canal had been made at the expense of the company; the defendants had availed themselves of the fruits of their labors, and used the canal freely and extensively for their own profit. Still the right to exact toll could not be implied, because such a privilege was not found in the charter.

* * * * *

But we are not now left to determine, for the first time, the rules by which public grants are to be construed in this country. The subject has already been considered in this court, and the rule of construction, above stated, fully established. In the case of *The United States* vs. *Arredondo,* 8 Pet. 738, the leading cases upon this subject are collected together by the learned judge who delivered the opinion of the court, and the principle recognized, that in grants by the public nothing passes by implication.

The rule is still more clearly and plainly stated in

the case of *Jackson* vs. *Lamphire,* in 3 Pet. 289. That was a grant of land by the State; and in speaking of this doctrine of implied covenants in grants by the State, the court *use* the following language, which is strikingly applicable to the case at bar: "The only contract made by the State is the grant to John Cornelius, his heirs and assigns, of the land in question. The patent contains no covenant to do, or not to do any further act in relation to the land; and we do not feel ourselves at liberty in this case, to create one by implication.

Thomas vs. *West Jersey R. R. Co.,* 101 U. S. 71, 25 L. Ed. 950 at 952, the Court held and said:

"It is next insisted, in the language of counsel, that though this may be so, a corporate body may (as at common law) do any act which is not either expressly or impliedly prohibited by its charter; although where the act is unauthorized by the charter a shareholder may enjoin its execution; and the State may, by proper process, forfeit the charter.

We do not concur in this proposition. We take the general doctrine to be in this country, though there may be exceptional cases and some authorities to the contrary, that the powers of corporations organized under legislative statutes are such and such only as those statutes confer. Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that the *enumeration of these powers implies the exclusion of all others.*

This class of subjects has received much consideration of late years in the English courts, and counsel, on both sides of the present case, have relied largely on the decisions of those courts. Among the cases cited by both sides is that of *E. Anglian R. Co.* vs. *Eastern Co. R. Co.,* 11 C. B. 775.

In that case the Eastern Counties Railway Company had made a contract in which, among other things, it covenanted to take a lease of several other *railroad* whose companies had introduced into Parliament a bill for consolidation under the name of East Anglian Railway Company, and to assume the payment of the parliamentary expenses of this Act of consolidation

This covenant was held void as beyond the power conferred by the charter. They cannot, said the Court, "engage in a new trade, because they are incorporated only

for the purpose of making and maintaining the Eastern Counties Railway. What additional power do they acquire from the fact that the undertaking may in some way benefit their line? Whatever be the object or prospect of success, they are still but a corporation for the purpose only of making and maintaining the Eastern Counties Railway; and if they cannot embark in new trades because they have only a limited authority, for the same reason they can do nothing not authorized by their act and not within the scope of their authority. This case, decided in 1851, was afterwards cited with approval by the Lord Chancellor in 1857 in delivering the opinion of the House of Lords in the case of *R. Co.* vs. *Hawkes,* 5 H. L. Cas. 331; and it is there stated that it was also acted on and recognized in the Exchequer Chamber in the case of *McGregor* vs. *R. R.,* 2 L. J. (N. S.) Q. B. 69. Both these cases are cited approvingly in the opinion of Lord Cairns in the case of Ashbury Company, on appeal in the House of Lords."

"This latter case, as decided in the Exchequer Chamber (*Riche* vs. *R. C. & I. Co.*), L. R. 9 Exch. 224, is much relied on by counsel for plaintiffs here as showing that, though the contract may be *ultra vires* when made by the directors, it may be enforced if afterwards ratified by the shareholders or if partly executed.

But in the House of Lords, where the case came on appeal, this principle was overruled unanimously in opinions delivered by Lord Chancellor Cairns, Lords Selborn, Chelmsford, Hatherly and O'Hagan, and the broad doctrine estabilshed that a contract not within the scope of the powers conferred on the corporation cannot be made valid by the assent of everyone of the shareholders, nor can it by any partial performance become the foundation of a right of action.

It would be a waste of time to attempt to examine the American cases on the subject, which are more or less conflicting, but we think we are warranted in saying that this latest decision of the House of Lords *represents the decided preponderance of authority,* both in this country and in England, and *is based upon sound principle.*

There is *another principle of equal importance* and equally conclusive against the validity of this contract, which, if not coming exactly within the doctrine of *ultra vires* as we have just discussed it shows very clearly that the Railroad Company was without the power to make such a contract."

"That principle is, that where a corporation like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions which undertakes, *without the consent of the State, to transfer to others the rights and powers conferred* by the charter, and *to relieve the grantees of the burden* which it imposes, is a *violation of the contract with the State, and is void as against public policy.* This doctrine is asserted with remarkable clearness in the opinion of this court, delivered by Mr. Justice Campbell, in the case of *R. R. Co.* vs. *Winans,* 17 How. 30, 15 L. Ed. 27. The corporation in that case was chartered to build and maintain a railroad in Pennsylvania by the Legislature of that State. The stock in it was taken by a Maryland corporation, called the Baltimore and Susquehanna Railroad Company, and the entire management of the road was committed to the Maryland company, which appointed all the officers and agents upon it, and furnished the rolling stock. In reference to this state of things and its effect upon the liability of the Pennsylvania corporation for infringing a patent of the defendant in error, Winans, this court said: 'This conclusion (argument) implies that the duties imposed upon plaintiff (in error) by the charter are fulfilled by the construction of the road, and that by alienating its right to use, and its powers of control and supervision, it may avoid further responsibility. But these acts involve an overturn of the relations which the charter has arranged between the Legislature and the community. Important franchises were conferred upon the corporation to enable it to provide facilities for communication and intercourse, required for public convenience. *Corporate management and control over these were prescribed, and corporate responsibility for their insufficiency provided as a remuneration for their grant. The corporation cannot absolve itself from the performance of its obligation without the consent of the Legislature. Seman* vs. *Rufford,* 1 Sim. (N. S.) 550; *Winch* vs. *R. Co.,* 13 L. & Eq. 506.'

"And in the case of *Black* vs *Canal Co.,* 7 C. E. Green, 130 (22 N. J. Eq. 130), Chancellor Zabriskie says: 'It may be considered as settled that a corporation *cannot lease or alienate any franchise or any property necessary to perform* its obligations and duties to the State, *without leg-*

islative authority.' For this he cites some ten or twelve decided cases in England and in this country."

In *Pennsylvania R. R. Co.* vs. *St. Louis, etc., R. R.,* 118 U. S. 290, 309; 30 L. Ed. 80, 83, 92, the Court held:

3. Unless specially authorized by its charter, or aided by some other legislative action, a railroad company cannot by lease or other contract turn over to another company for a long period of time its road and all its appurtenances, the use of its franchises, and the exercise of its powers; nor can any other railroad company, without similar authority, make a contract to run and operate such road, property and franchises of the first corporation. Such a contact is not among the ordinary powers of a railroad company, and is not to be inferred from the usual grant of powers in a railroad charter. *Thomas* vs. *Railroad Co.,* Bk. 25, reaffirmed.

4. The Act of the Illinois Legislature of February 12, 1855, is a sufficient authority on the part of the St. Louis, Alton and Terra Haute Company to make the lease sued on in this case.

5. But if the other party to the contract, the Indianapolis and St. Louis Company, had no such authority, the contract is void as to it; and if the other Companies had no power to guaranty its performance, it is void as to them, and cannot give a right of action against them.

6. An examination of the Statutes of Indiana and of the decisions of its courts fails to show, in the one or the other, any authority for an Indiana railroad company to make such a contract as that between the principal contracting Companies in this case.

7. Nor is any authority found in the charters of any of these guarantying Companies, or of the laws of the States under which they are organized, to guaranty the performance of such a contract as this, with the parties to it and the road which it relates to being outside the limits of these States, and having no direct connection with their roads.

* * * * *

After quoting from *Thomas* vs. *West Jersey R. R. Co.,* the Court said:

"The reports of decisions in the English courts were very fully examined, as will be seen by reference to cases cited in counsels' briefs, and many of them specially referred to in the opinion; also several cases in this court and in the state courts of this country.

It is not expedient here to go again over the ground there considered, as we are of opinion now, as we were then, that the great preponderance of judicial decisions supports the proposition above stated.

It has been distinctly recognized, and repeated in this court in the case of the *Green Bay & M. R. R. Co.* vs. *Union Steamboat Co.,* 107 U. S. 98 (Bk. 27, L. Ed. 413).

It is cited with approval in the Supreme Court of Massachusetts in the case of *Davis* vs. *Old Colony R. R. Co.,* 131 Mass. 258.

This latter opinion is a very full and able review of all the important decisions on that subject, and sustains very clearly the main propositions.

In this court the principle is completely covered by the decision of the case of *Pearce* vs. *Madison & I. R. R. Co., etc.,* 21 How. 441 (62 U. S. bk. 16, L. Ed. 184), decided in 1858. In that case the defendant companies, whose road at one end of it terminated on the Ohio River, had purchased a steamboat to be used on that river in connection with their freight and passenger traffic, and had given notes for the purchase money. In a suit on these notes this court ruled that they were void for want of any authority in the companies to buy the boat or to engage in the carrying trade on the river.

The opinion delivered by Mr. Justice Campbell cites several of the English cases relied on in *Thomas* vs. *R. R. Co.,* and in *Davis* vs. *Old Colony R. R. Co.,* above referred to, and concludes with the observation that "the opinion of the court is, that it was a departure from the business of the corporation, and that their officers exceeded their authority." This doctrine had been previously asserted with great force in the case of *York & Maryland Line R. R. Co.* vs. *Winans,* 17 How. 30 (58 U. S. bk. 15, L. Ed. 27).

These are all cases in which railroad companies were parties, and their powers, as regulated by their charters, were the matters mainly considered. There are many other cases of the highest authority where railroad corporations are held to the doctrine laid down in *Thomas* vs. *R. R. Co.; Eastern Counties Railway* vs. *Hawke,* 5 H. L. Cas. 331, 371-381; *Ashbury Railway Carriage and I Co.* vs. *Riche,* L. R. 7 H . L. 653; *McGregor* vs. *Dover & Deal,* R. 18 Q. B. 618; *East Anglian Railway* vs. *Eastern Counties,* R. 11 Q. B. 775.

We think it may be stated, as the just result of these cases and on sound principle, that, unless specially author-

ized by its charter, or aided by some other legislative action, a railroad company cannot, by lease or any other contract, turn over to another company, for a long period of time, its road and all its appurtenances, the use of its franchises, and the exercise of its powers; nor can any other railroad company without similar authority make a contract to receive and operate such road, franchises, and property of the first corporation; and that such a contract is not among the ordinary powers of a railroad company, and is not to be presumed from the usual grant of powers in a railroad charter.

In *Valley* vs. *Northern F. & M. Ins. Co.,* 254 U. S. 348, 65 L. Ed. 297, at 299, 301, the Court held and said:

"1. Is a petition to revise in matter of law under Sec. 24 b of the Bankruptcy Act the proper remedy to review an order of an inferior court of bankruptcy vacating an adjudication and dismissing the bankruptcy proceeding for want of jurisdiction upon the motion of the bankrupt after the expiration of the time for appeal, he having neither contested the involuntary petition against him nor appealing from the jurisdiction?" Answered, Yes.

"2. Where it appears from the averments of a petition in involuntary bankruptcy that the person proceeded against is an insurance corporation, and therefore within the exceptions of Sec. 4 b of the Bankruptcy Act as amended June 25, 1910 (36 Stat. at L. 839, Chap. 412, Comp. Stat. Sec. 9588, 1 Fed. Stat. Anno. 2d Ed., p. 569), is there such an absence of jurisdiction in the court of bankruptcy that its adjudication, rendered upon due service of process and default, and not appealed from, should be vacated and the proceeding be dismissed upon the motion of the bankrupt after the time for appeal has expired?" Answered Yes.

"3. Where an insurance corporation adjudged bankrupt (353) in an involuntary proceeding after the passage of the amendatory Act of June 25, 1910 (36 Stat. at L. 839, chap. 412), upon due service of process and default, does not appeal from the adjudication, but acquiesces therein, and aids the trustee in the performance of his duties in administering the estate, may it be estopped from thereafter questioning the validity of the adjudication and the power of the court and the trustee to proceed?" Answered No.

Of the construction of the statute there can be no controversy; what answer shall be made to the questions turns

on other considerations,—turns on the effect of the conduct of the company as an estoppel. That it has such effect is contended by the trustee, and there is an express concession that, if objection had been made, the company would have been entitled to a dismissal of the petition. It is, however, insisted that it is settled "that an erroneous adjudication against an exempt corporation, whether made by default or upon a contest or trial before the bankruptcy court, can be attacked only by appeal, writ of error, or prompt motion to vacate", and that Sec. 4 does not relate to the jurisdiction of the court over the subject-matter. "It does not, therefore," is the further contention, "create or limit jurisdiction of the court with respect to its power to consider and pass upon the merits of the petition." And that "the valid exercise of jurisdiction does not depend upon the correctness of the decision". And again, if the court, in the exercise of its jurisdictional power, "reached a wrong conclusion, the judgment is not void, it is merely error to be corrected on appeal or by motion to vacate, timely made; but, as long as it stands, it is binding on everyone". There is plausibility in the propositions, taken in their generality, but there are opposing ones. "Courts are constituted by authority, and they cannot go beyond the power delegated to them. If they act beyond that authority, and certainly in contravention of it, their judgments and orders are regarded as nullities. They are (354) not voidable, but simply void, and this even prior to reversal. *Elliott* vs. *Peirson*, 1 Pet. 328, 340, 7 L. Ed. 164, 170; *Old Wayne Mut. Life Asso.* vs. *McDonough*, 204 U. S. 8, 51 L. Ed. 345, 27 Sup. Ct. Rep. 236." * * *

"We may use for illustration a municipal corporation. Its creditors may be enterprising, its officers acquiescent or indifferent; can, therefore, the allegations of the former and the default of the latter confer jurisdiction on the district court to entertain a petition in bankruptcy against the corporation, and render a decree therein? And if not, why not? If consent can confirm jurisdiction, why not initially confer jurisdiction? It is not necessary to point out the disorder that would hence result, and the difficulties that the officers of a bankrupt court would encounter in such situation. The legislative power thought care against the possibility of it was necessary, and in that care associated insurance corporations. For a court to extend the act to corporations of either kind is to enact a law, not to execute one."

In *Chicago, B. & Q. R. Co.* vs. *Willard,* 220 U. S. 413; 55 L. Ed. 521, 525, the court held and said, at page 523:

"Had the circuit court jurisdiction of this case? As the plaintiff withdrew and did not renew his motion to remand to the state court, but went to trial in the Federal court without objection, was the circuit court of appeals, or is this court, precluded from considering the question of jurisdiction? These questions can have but one answer. It is firmly established by many decisions that in every case pending in an appellate Federal court of the United States, the inquiry must always be whether, under the Constitution and laws of the United States, that court or the court of orignal jurisdiction could take cognizance of the case. The leading authority on the subject is *Mansfield, C. & L. M. R. Co.* vs. *Swan,* 111 U. S. 379, 382, 28 L. Ed. 462, 463, 4 Sup. Ct. Rep. 510, where the cases are fully reviewed. In that case the question of jurisdiction was raised in this court by the party at whose instance the subordinate Federal court exercised jurisdiction. But that fact was held not to be decisive; for, said Mr. Justice Matthews, speaking for the court, 'on every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it.' This rule was said to be inflexible and without exception, and has been uniformly sustained by this court. In *Ayers* vs. *Watson,* 113 U. S. 594, 598, 28 L. Ed. 1093, 1094, 5 Sup. Ct. Rep. 641, Mr. Justice Bradley, speaking for the court, and referring to the 2d section (the removal section) of the act of 1875 (18 Stat. at L. 470, chap. 137, U. S. Comp. Stat. 1901, p. 509), said: 'In the nature of things, the 2d section is jurisdictional, and the 3d is but modal and formal. The conditions of the 2d section are indispensable, and must be shown by the record, the directions of the 3d, though obligatory, may, to a certain extent, be waived. Diverse state citizenship of the parties, or some other jurisdictional fact prescribed by the 2d section, is absolutely essential, and cannot be waived, and the want of it will be error at any stage of the cause, even though assigned by the party at whose instance it was committed. *Mansfield, C. & L. M. R. Co.* vs. *Swan,* 111 U. S. 379, 28 L. Ed. 462, 4 Sup. Ct. Rep. 510.' In *Cameron* vs. *Hodges,* 127 U. S. 322, 326, 32 L. Ed. 132, 134, 8 Sup. Ct. Rep. 1154, it

was held to be an express requirement of the statute that the circuit court shall remand a case to the court from which it was removed whenever it appears that it is not one of which the Federal court can properly take cognizance In *Martin* vs. *Baltimore & O. R. Co.* (*Gerling* vs. *Baltimore & O. R. Co.*), 151 U. S. 673, 689, 38 L. Ed. 311, 317, 14 Sup. Ct. Rep. 533, after referring to the judiciary act of 1875, Mr. Justice Gray, speaking for the court, said: 'Diverse state citizenship of the parties, *or some other jurisdictional fact prescribed by the* 2d section, *is absolutely essential, and cannot be waived, and the want of it will be* error at any stage of the cause, even though assigned by the party at whose instance it was committed.' In *Minnesota* vs. *Northern Securities Co.,* 194 U. S. 48, 62, 63, 48 L. Ed. 870, 877, 878, 24 Sup. Ct. Rep. 598, in which both parties insisted upon the jurisdiction of the circuit court, the said court: '*Consent of* (*the*) *parties can* never confer jurisdiction upon a Federal court. *If the record does not affirmatively show jurisdiction* in the circuit court, we *must,* upon our own motion, so *declare,* and make such order as will prevent that court from exercising an authority not confererd upon it by statute.' In *Thomas* vs. *Ohio State University,* 195 U. S. 207, 211, 49 L. Ed. 160, 164, 25 Sup. Ct. Rep. 24: 'It is equally well established that when jurisdiction depends upon diverse citizenship, the absence of sufficient averments or of facts in the record showing such required diversity of citizenship is fatal, and cannot be overlooked by the court, even if the parties fail to call attention to the defect, or consent that it may be waived.' In *Kentucky* vs. *Powers,* 201 U. S. 1, 35, 50 L. Ed. 633, 648, 26 Sup. Ct. Rep. 387, 5 A. & E. Ann. Cas. 692, it was said that this court 'must see to it that they (the subordinate courts of the United States) do not usurp authority given to them by acts of Congress,'—citing *Mansfield, C. & L. M. R. Co.* vs. *Swan,* 111 U. S. 379, 382, 28 L. Ed. 462, 463, 4 Sup. Ct. Rep. 510. In *Perez* vs. *Fernandez,* 202 U. S. 80, 100, 50 L. Ed. 942, 949, 26 Sup. Ct. Rep. 561, which came to this court from the district court of the United States for the district of Porto Rico, this court, upon the authority of the Swan and other cases cited, held that 'where the jurisdiction fails, the objection can be raised in this court; if not by the parties, then by the court itself'' There are many other authorities to the same effect, but we cite a few of the additional cases: *King Iron Bridge & Mfg. Co.* vs. *Otoe County,* 120 U. S. 225, 30 L. Ed. 623, 7 Sup. Ct. Rep.

552; *Continental L. Ins. Co.* vs. *Rhoads,* 119 U. S. 237, 30 L. Ed. 380, 7 Sup. Ct. Rep. 193; *Peper* vs. *Fordyce,* 119 U. S. 469, 30 L. Ed. 435, 7 Sup. Ct. Rep. 287; *Blaclock* vs. *Small,* 127 U. S. 96, 103, 105, 32 L. Ed. 70, 73, 8 Sup. Ct. Rep. 1096; *Metcalf* vs. *Watertown,* 128 U. S. 586, 587, 32 L. Ed. 543, 9 Sup. Ct. Rep. 173; *Crehore* vs. *Ohio & M. R. Co.,* 131 U. S. 240, 242, 33 L. Ed. 144, 145, 9 Sup. Ct. Rep. 692; *Graves* vs. *Corbin,* 132 U. S. 571, 589, 33 L. Ed. 462, 468, 10 Sup. Ct. Rep. 196; *Neel* vs. *Pennsylvania Co.,* 157 U. S. 153, 39 L. Ed. 654, 15 Sup. Ct. Rep. 589; *Continental Nat. Bank* vs. *Buford,* 191 U. S. 119, 120, 48 L. Ed. 119, 24 Sup. Ct. Rep. 54."

JOINT RESOLUTION OF MAY 31, 1870.
(16 State 378)

RESOLVED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES IN CONGRESS ASSEMBLED, That the Northern Pacific Railroad Company, be and hereby is, authorized to issue its bonds to aid in the construction and equipment of its road, and to secure the same by mortgage on its property and rights of property of all kinds and descriptions, real, personal, and mixed, including its franchises as a corporation; and, as proof and notice of its legal execution and effectual delivery, said mortgage shall be filed and recorded in the office of the Secretary of the Interior, and also to locate and construct, under the provisions and with the privileges, grants, and duties provided for in its act of incorporation, its main road to some point on Puget Sound, via the valley of the Columbia River, with the right to locate and construct its branch from some convenient point on its main trunk lien across the Cascade Mountains to Puget Sound; and in the event of there not being in any State or Territory in which said main line or branch may be located, at the time of the final location thereof, the amount of lands per mile granted by Congress to said company, within the limits prescribed by its charter, then said company shall be entitled, under the directions of the Secretary of the Interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, in such State or Territory, within ten miles on each side of said road, beyond the limits prescribed in said charter, as will make up such deficiency, on said main line or branch, except mineral and other lands as exempted in the charter of said company of eighteen hundred and

sixty-four, to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of subsequent to the passage of the act of July two, eighteen hundred and sixty-four, and that twenty-five miles of said main line between its western terminus and the city of Portland, in the State of Oregon, shall be completed by the first day of January, anno Domini eighteen hundred and seventy-two, and forty miles of the remaining portion thereof each year thereafter until the whole shall be completed between said points: PROVIDED, That all lands hereby granted to said company which shall not be sold or dsiposed of *or remain subject* to the mortgage by this act authorized, at the expiration of five years after the completion of the entire road, shall be subject to settlement and pre-emption like other lands, at a price to be paid to said company not exceeding two dollars and fifty cents per acre; and if the mortgage hereby authorized shall at any time be enforced by foreclosure or other legal proceeding, or the mortgaged lands hereby granted, or any of them, be sold by the trustees to whom such mortgage may be executed, either at its maturity or for any failure or default of said company under the terms thereof, such lands shall be sold at public sale, at places within the States and Territories in which they shall be situate, after not less than sixty days' previous notice, in single sections or subdivisions thereof, to the highest and best bidder. PROVIDED FURTHER, That in the construction of the said railroad, American iron or steel only shall be used, the same to be manufactured from American ores exclusively.

SEC. 2. AND BE IT FURTHER RESOLVED, That Congress may at any time alter or amend this point resolution, having due regard to the rights of said company and any other parties.

In *Louisville Trust Co.* vs. *Louisville N. A. & C. R. Co.,* 174 U. S. 674; 43 L. ed. 1130 the Court said: "But this court long since recognized the fact that in the present condition of things (and all judicial proceedings must be adjusted to facts as they are) other inquiries arise in railroad foreclosure proceedings accompanied by a receivership than the mere matter of the amount of the debt of the mortgagor to the mortgagee. We have held in a series of cases that the peculiar character and conditions of railroad property not only justify, but compel, a court entertaining foreclosure proceedings to give to certain limited

unsecured claims a priority over the debts secured by the mortgage. It is needless to refer to the many cases in which this doctrine has been affirmed. It may be, and has often been, said that this ruling implies somewhat of a departure from the apparent priority or right secured by a contract obligation duly made and duly recorded, and yet this court, recognizing that a railroad is not simply private property, but *also an instrument of public service,* has ruled that the character of its business, and the public obligations which it assumes, justify a limited displacement of contract and recorded liens in behalf of temporary and unsecured creditors. These conclusions, while they to a certain extent ignored the positive promises of contract and recorded obligations, were enforced in obedience to equitable and public considerations. We refer to these matters not for the sake of reviewing those decisions but to note the fact that foreclosure proceedings of mortgages covering extensive railroad properties are not necessarily conducted with the limitations that attend the foreclosures of ordinary real estate mortgages.

* * * * * *

Said: "Can it be that when in a court of law the right of an unsecured creditor is judicially determined and that judicial determination carries with it a right superior to that of a mortgagor, the mortgagor and mortgagee can enter into an agreement by which through the form of equitable proceedings all the right of this unsecured creditor may be wiped out, and the interest of both mortgagor and mortgagee in the property preserved and continued? The question carries its own answer. Nothing of the kind can be tolerated."

Beyond the positive and verified statement of the petition of the Louisville Trust Company are many facts appearing in the record which strongly support this allegation. That a corporation whose stock consists of $16,000,000, $7,000,000 of which is preferred stock, all of which must be expected to be wiped out if a mortgage interest of $13,800,000 is fully asserted, hastens into court and confesses judgment on an alleged unsecured liability; on the same day responds to an application for a receiver and assents thereto; makes no effort during the receivership to prevent default in interest obligations; tacitly, at least, consents to an order made on application of the receiver for the issue of $200,000 worth of receiver's certificates in aid of betterments on the road, when the same sum might

have paid the interest and delayed the foreclosure; when foreclosure bills are filed not only makes no denial, but admits all the averments of the mortgage obligation and default—in other words, seems a debtor most willing to have all its property destroyed, and this because of one short wheat crop; these matters suggest, at least, that there is probable truth in the sworn averment of the petitioner that all was done by virtue of an agreement between the mortgagee and mortgagor (bondholder and stockholder) to preserve the relative interests of both, and simply extinguish unsecured indebtedness. When, in addition to this fact, it appears that these proceedings are initiated within a few days after a decree of the circuit court of appeals—a decree final unless brought to this court for review in its discretion by *certiorari;* that a large amount of unsecured indebtedness was by that decree cast upon the mortgagor, we cannot doubt that such a condition of things was presented to the trial court that it ought, in discharge of its obligations to all parties interested in the property, to have made inquiry and ascertained that no such purpose as was alleged in the intervening petition was to be consummated by the foreclosure proceedings.

* * * * * *

It is also true that no evidence was offered by the petitioner in support of the allegations of its petition, but it is not true that in revising and reversing the final action of the circuit court we are acting on mere suspicion, or disturbing either settled rules or admitted rights. The allegations of this intervening petition as to the wrong intended and being consummated were specific and verified. The delay, under the circumstances was not such as to deprive the petitioner of a right to be heard. The facts apparent on the face of the record were such as justified inquiry, and upon those facts, supported by the positive and verified allegations of the petitioner, it was the duty of the trial court to have stayed proceedings, and given time to produce evidence in support of the charges Taking them as a whole, they are very suggestive, independent of positive allegation; so suggestive at least, that, when a distinct and verified charge of wrong was made, the court should have investigated it.

* * * * * *

It is no answer to these objections to say that a bondholder may foreclose in his own separate interest, and, after acquiring title to the mortgaged property, may give

what interest he pleases to anyone, whether stockholder or not, and so these several mortgagees foreclosing their mortgages, if proceeding in their own interest, if acquiring title for themselves alone, may donate what interests in the property, acquired by foreclosure they desire. But human nature is something whose action can never be ignored in the courts, and parties who have acquired full and abslute title to property are not as a rule donating any interest therein to strangers. It is one thing for a bondholder who has acquired absolute title by foreclosure to mortgaged property to thereafter give of his interest to others, and an entirely different thing whether such bondholder, to destroy the interest of all unsecured creditors, to secure a waiver of all objections on the part of the stockholder and consummate speedily the foreclosure, may proffer to him an interest in the property after the foreclosure The former may be beyond the power of the courts to inquire into or condemn. The latter is something which on the face of it deserves the condemnation of every court, and should never be aided by any decree or order thereof. It involves an offer, a temptation, to the mortgagor, the purchase price thereof to be paid, not by the mortgagee, but in fact by the unsecured creditor.

* * * * * *

But considering the public interests in the property the peculiar circumstances which attend large railroad mortgages, must see to it that all equitable rights in or connected with the property are secured.

In *U. S.* vs. *Union Pacific R. R. Co.*, 98 U. S. 569, 25 L. ed. 143, the Court said: "The Act of Congress making appropriations for the legislative, executive and judicial expenses of the Government, approved March 3, 1873, has the following language in its fourth and last section:

'The Attorney General shall cause a suit in equity to be instituted, in the name of the United States, against the Union Pacific Railroad Company, and against all persons who may, in their own names or through any agents, have subscribed for or received capital stock in said road, which stock has not been paid for in full in money, or who may have received, as dividends or otherwise, portions of the capital stock of said road, or the proceeds or avails thereof, or other property of said road, unlawfully and contrary to equity; or who may have recived as profits or proceeds of contracts for construction or equipment of said road, or other contracts therewith, moneys or other property

which ought, in equity, to belong to said railroad corporation; or who may, under pretense of having complied with the acts to which this is an addition, have wrongfully and unlawfully, received from the United States bonds, moneys or lands, which ought, in equity, to be accounted for and paid to said railroad company or to the United States, and to compel payment for said stock, and the collection and payment of such moneys, and the restoration of such property, or its value, either to said railroad corporation or to the United States, which ever shall in equity be held entitled thereto. Said suit may be brought in the circuit court in any circuit, and all said parties may be made defendants in one suit. Decrees may be entered and enforced against any one or more parties defendant without awaiting the final determination of the cause against other parties. The court where said cause is pending may make such orders and decrees, and issue such process as it shall deem necessary to bring in new parties, or the representatives of parties deceased, or to carry into effect the purposes of this Act. On filing the bill, writs of subpoena may be issued by said court against any parties defendant, which writ shall run into any district, and shall be served, as other like process, by the marshal of such district.' 17 Stat. at L. 508.

"Following this, and part of the same section, are certain provisions for the future government of the Railroad Company and its officers to-wit: that its books and correspondence shall at all times be open to inspection by the Secretary of the Treasury; that no dividend shall be made but from actual net earnings, and no new stock issued or mortgages created without consent of Congress; and punishing directors who shall violate these provisions. Also enacting that the Corporation shall not be subject to the bankrupt law, and shall be subjectt o a mandamus to compel it to operate its road, as required by law.

"A previous section of the Act directs the Secretary of the Treasury to withhold from every railroad company which has failed to pay the interest on bonds advanced to it by the Government, all payments on account of freights or transportation over such roads, to the amount of such interest paid by the United States, and also the *fiver* per cent. of the net earnings of the roads due and unapplied as provided by law; and it authorized the companies who might wish to contest the right to withhold these payments

to bring suit against the United States in the Court of claims for the money so withheld."

* * * * * *

"The question is, therefore, squarely presented to us for decision, as it was to the circuit court, whether this bill can be sustained under the general principles of equity jurisprudence by the aid of the special statute, and within the limits of the power intended to be conferred by the statute.

"We say by the aid of the special statute, because it is conceded on all sides that the bill cannot stand without that aid. The service of compulsory process on parties residing without the limits of the districts of Connecticut, who are not found within those limits, is expressly forbidden by the general statute defining the jurisdiction of the circuit courts. Parties and subjects of complaint are brought together in one suit by this bill which, by the accepted canons of equity pleading, are incongruous and multifarious, having no proper connection with each other, except as they are so grouped in this bill. This, and other matters of like character, are proper causes of *demurer,* and fatal to this bill, unless the difficulty be cured by the statute.

"When we recur to the provisions of the Act which are said to authorize these and other departures from the general rules of equity procedure, counsel for appellees reply that the statute is unconstitutional; that it is not only void in the particulars just alluded to, but that is is absolutely void as affecting the substantial rights of defendants in regard to matters beyond the legislative power of Congress.

* * * * * *

"Whether parties, to a suit shall be compelled to answer in any court of the United States wherever they may be served with process, or shall only be bound to appear when found within the district where the suit is brought, is mere matter of legislative discretion, a discretion which ought to be governed by considerations of convenience, expense, etc., but which, when exercised by Congress, is controlling in the courts.

"So, also, the doctrine of multifariousness; whether it relate to improperly combining persons or grievances in the bill, is a rule of courts of equity adopted by those courts on the same principle. It has been found convenient in the administration of justice, and promotive of that end, that

parties who have no proper connection with each other shall not be compelled to litigate together in the same suit, and that matters shall not be alleged and litigated in one suit which are wholly distinct from and have no relation to each other, and which require defenses equally unconnected. The rule itself, however, is a very accommodating one, and by no means inflexible. Such as it is, however, it is under the control of the legislative will, and may be modified, limited and controlled by the same power which creates the court and confers its jurisdiction. It is simply a matter of practice. The Constitution imposes no restraint in this respect upon the legislative power of Congress."

* * * * * *

"This court said, in the case of *Bk.* vs. *Okely,* 4 Wheat., 235, in speaking of a summary proceeding given by the charter of that bank for the collection of its debts.

'It is the remedy, and not the rights, and as such we have no doubt of its being subject to the will of Congress. The forms of administering justice, and the duties and powers of courts as incident to the exercise of a branch of sovereign power, must ever be subject to legislative will, and the power over them is unalienable, so as to bind subsequent Legislatures." And in *Young* vs. *Bk.,* 4 Cranch, 397, Chief Justice Marshall says: "There is a difference between these rights on which the validity of the transactions of the corporation depends, which must adhere to these transactions everywhere, and those peculiar remedies which may be bestowed on it. The first are of general obligation; the last can only exercised in those courts which the power making the grant can regulate." See, also, *Canal Co.* vs. *Com.,* 43 Pa., 227; *Maryland* vs. *R. R. Co.,* 18 Md., 193; *Colby* vs. *Dennis,* 36 Me., 1; *Gowen* vs. *R. R. Co.,* 44 Me., 140.

"This class of statutes, if not so common as to be called ordinary legislation, are yet frequent enough to justify us in saying that they are well recognized acts of legislative power uniformly sustained by the courts.

"It may be said, and probably with truth, that such statutes, when they have been held to be valid by the courts, do not infringe the substantial rights of property or of contract of the parties affected, but are intended to supply defects of power or to give improved methods of procedure to the courts in dealing with existing rights."

* * * * * *

"We are of opinion, therefore, that the Act under which this suit is brought was not intended to change the substantial rights of the parties to the suit which it authorized, and that it was intended to provide a specific method of procedure, which, by removing restrictions on the jurisdiction, processes and pleading in ordinary cases; would give a larger scope for the action of the court, and a more economical and *efficient remedy than existed before;* and that it is a valid and constitutional exercise of legislative power."

* * * * *

"The difficulty is, to whom shall this money be paid when recovered, and can it be recovered in this suit? If the Railroad Corporation, *falling into purer hands,* had brought such a suit, the bill might be sustained.

"But *the Corporation is not plaintiff here. It seeks no relief for these wrongs. It may have been the design of the law to give the Corporation an opportunity by a cross-bill against the* other defendants, who are charged with these frauds to obtain relief against them. *Such a bill, if not strictly within the rule of equity procedure, which only allows a defendant to file a cross-bill against a plaintiff, might be sustained under the provisions of this statute.*

"But the Corporation files no such bill. It desires no such relief. On the contrary, it resists by demurrer any further proceeding in the matter."

* * * * *

"The truth is, that the persons who were actually defrauded by these transactions, if any such there be, *were the few bona fide holders of the stock of the Corporation* who took no part in these proceedings, and had no interest in the fraudulent contracts. But it is not alleged that there were such. If there are any such, they are not made parties to this bill, nor *does the bill provide any relief for them.* Yet, a moment's consideration will show that they alone (to say nothing of plaintiffs for the present) suffered any legal injury, or are entitled to any relief. As to the directors and stockholders who took part in these fraudulent contracts, they are *participes criminis,* and can have no relief. This class probably included nine-tenths in value of the shareholders. It is against all the principles of jurisprudence, whether at law or in equity, to permit them to litigate this fraud among themselves. If

the innocent stockholders are not parties here, we have already seen that, with the power of the directors over the money recovered, they would get no relief by the suit.

"The statute, however, did not permit them to be made parties. Their interest is not the same as the Company. The statute provides only for collection and payments of money or restoration of property, or its value, to the railroad corporation, or to the United States, as either of them may be in equity held entitled thereto. This does not embrace what a defrauded stockholder may be entitled to in his individual right."

ASSIGNMENTS OF ERROR.

I.

The Court erred in denying leave to file the Intervening Petition of these petitioners filed on January 31, 1938, as the said Petition stated a good cause of action is timely and sought relief and prevention of delivery to the Northern Pacific Railway Company, of lands or other value, which the said Northern Pacific Railroad Company had not taken possession of, but which it is seeking in this suit.

II.

These Petitioners adopt and make part of this Assignment of Errors, each and all the Assignments of Error filed by the Northern Pacific Railroad Company by Charles E. Schmidt, and other minority stockholders in this cause, this day, except Assignments of Error Number 10 and number 11, and make such Assignments of Errors applicable to all pleadings filed by these petitioners.

NOW COMES The Northern Pacific Railroad Company by Charles E. Schmidt and other minority stockholders and makes, presents and files the following Assignments of Error on appeal.

I.

The Court erred in the Decree of May 24, 1932, by referring this cause on a Motion of the Railway Company and others (to which Motion the Railroad Company was not a party, though the Decree by mistake states it was on the Motion of the Northern Pacific Railroad Company) to the Special Master on the pleas, motions to dismiss and other pleadings as such reference was in violation of equity rule 59 as construed by *In re* Parker, 283 Fed. 404 at 408 (4) Ill. (C. C. A. 7), which reversed and cancelled such a reference; *in re* King, 179 Fed. 694 (C. C. A. 7), and *in re* Bartleson Co., 243 Fed. 1001 (D. C. Fla), and as this decree was sustained by the decrees of October 3, 1935, as amended by the Decree of January 29, 1936, affirming the report of the Special Master under the decree of May 24, 1932, the court again erred.

II.

Having thus erroneously granted the said reference, the court erred in the Decree of October 3, 1935, as amended January 29, 1936, by overruling Exception No. 1 filed for the Northern Pacific Railroad Company by Attorneys for the Northern Pacific Railway Company to the first Report of the Special Master filed May 31, 1933, thus overruling the general motion to dismiss filed for the Northern Pacific Railroad Company by the Attorneys for the Northern Pacific Railway Company (Report, page 35).

III.

The Court erred in denying said general Motion to dismiss the Bill and Amended Bill, as the said Bill and Amended Bill did not put in issue the validity of the foreclosures of the mortgages claimed to have been executed by the Northrn Pacific Railroad Company, which included the question or issue of the power of the Northern Pacific Railroad Company to place more than one mortgage on the lands granted, nor did the Bill or Amended Bill put in issue the other disputes mentioned in the last clause

of Section 5 of the Act of June 25, 1929, which directed and made it mandatory on Attorney General to put in issue and to have determined by the court.

IV.

If the court held, as it now states it did, that the validity of the said mortgages was determined in confirming the first report of the Special Master, by the decree of Oct. 3, 1935, as amended Jan. 29, 1936, such ruling and determination was erroneous as the said validity of said mortgages was not pleaded, was not in issue, was not contested, and there was no evidence on the point, and the reference was on the pleading.

V.

Having thus erroneously granted the said reference, the court erred in the Decree of October 3, 1935, as amendde January 29, 1936, by overruling Exception No. 2, filed for the Northern Pacific Railroad Company, by attorneys for the Northern Pacific Railway Company, to the first Report of the Special Master filed May 31, 1933, thus holding that the plea of laches was not maintainable against the land grant (Report, pages 36-37).

VI.

Having thus erroneously granted the said reference, the court erred in the Decree of October 3, 1935, as amended January 29, 1936, by overruling Exception No. 3, filed for the Northern Pacific Railroad Company by Attorneys for the Northern Pacific Railway Company to the first Report of the Special Master filed May 31, 1933, thus overruling the plea of *res adjudicata* (Report, page 38).

VII.

Having thus erroneously granted the said reference, the court erred in the Decree of October 3, 1935, as amended January 29, 1936, by overruling Exception No. 4, filed for the Northern Pacific Railroad Company by Attorneys for

the Northern Pacific Railway Company to the first Report of the Special Master filed May 31, 1933 (Report, page 95).

VIII.

The court erred in its decree of March 9, 1938, by denying the Motion of the Northern Pacific Railroad Company by Charles E. Schmidt and other minority stockholders, filed February 19, 1938, to construe, modify and amend the second report of the Special Master filed July 26, 1937, as the court thus left the Report confusing and contradictory as to the ownership of the Northern Pacific Railroad properties, lands and land grants, and the court further erred by refusing to construe and amend said report to make it state that title to and ownership of the Northern Pacific Railroad properties and lands and land grants were in the Northern Pacific Railroad Company, or to reserve the question of such title and ownership until it could be determined on the Answer and Cross-bill of the Northern Pacific Railroad Company filed by Charles E. Schmidt and other minority stockholders, September 3, 1937, and or the Intervening Petition of Charles E. Schmidt and other minority stockholders filed January 31, 1938; the Master's Report indicates 34 plus, times that the property and lands belong to "the company" without indicating what company, 18-plus times to the Railway Company, and a number of times to the Railroad Company.

IX.

The Court also erred in its Decree of March 22nd, 1938, by denying the Petition and Motion to Rehear of the Northern Pacific Railroad Company by Charles E. Schmidt and other Minority Stockholders, filed March 11, 1938, on these points.

X.

The Court erred in its decree of March 9, 1938, by striking the Answer and Cross-bill of the Northern Pacific Railroad Company by Charles E. Schmidt and other mi-

nority Stockholders, filed September 3, 1937, as motions to strike go only to the form and not the merits, and the said Answer and Cross-bill are perfect as to form, and no objection pointed out as to form; the Northern Pacific Railway Company filed a Motion to Strike the said Cross-bill and Answer, and plaintiff filed a Motion entitled, Motion to Strike, and asked that the Answer and Cross-bill be stricken, but it included a clause asking that Cross-bill be dismissed as it did not state a cause of action against the United States, but did not put up a defense of laches or any other specific defense.

XI.

The Court erred in its decree of March 22, 1938, by denying the Petition and Motion of the Northern Pacific Railroad Company to rehear the Decree of March 9, 1938, and to allow the Northern Pacific Railroad Company to amend at bar its cross-bill and answer by making the intervening Petition of Charles E. Schmidt and other minority stockholders, and each of the allegations thereof, a part of the said Cross-bill and Answer, as this would not have worked any delay, the Cross-bill and Answer had not been dismissed and the parties put out of court, but the Cross-bill and Answer had only been stricken, and under the liberal rules of amending, the Railroad Company was entitled to amend as of right; there was no answer, plea or motion to strike or dismiss the said Petition and motion, or other objection thereto, filed, against the motion to rehear and amend, and it was denied and not stricken; leave to amend was asked in Paragraph XXI, and others of cross-bill.

XII.

The Court erred in the Decree of March 9, 1938, by striking the joinder in the Motion of the Northern Pacific Railroad Company to re-refer the cause to the Special Master, which joinder was filed February 19th, 1938, as there was no Motion filed to strike the said joinder, (a) it

was erroneous to strike it as the Northern Pacific Railroad Company is vitally interested in the report and having it properly completed by further reference, and (b) the Court cannot of its own motion, strike a pleading from the files as Motions to Strike go only to form.

XIII.

The Court erred in its decree of March 9, 1938, by striking the exceptions filed February 19, 1938, to report of July 26, 1937, by the Northern Pacific Railroad Company by Charles E. Schmidt and other minority stockholders, as under the allegations of the Answer and Cross-bill which were not denied that ownership and title of the properties, lands and land grants of the Northern Pacific Railroad are in the Northern Pacific Railroad Company, and that the Northern Pacific Railway Company holding the Northern Pacific Railroad Company in captivity through the Northern Pacific Railway Company's Attorneys, filed a disclaimer of title and ownership of the Northern Pacific Railroad Company to the said property, lands and land grants, and was not properly representing, preserving or protecting the rights of the Northern Pacific Railroad Company;

The Court erred in its Decree of March 22, 1938, in denying the Petition and Motion to rehear the Decree of March 9th, 1938, on the exceptions, as the allegations of the said Petition and Motion were not denied but admitted, and there was no Motion to Dismiss, strike or other objection filed against it, nor was there any denial of the allegations of the said Answer and Cross-bill, and of the said Intervening Petition.

XIV.

The Court erred in its Decree of March 9th, 1938, in striking the Motion of the Northern Pacific Railroad Company for an extension of time to file exception to the Spe-

cial Master's Report filed July 26th, 1937, as there was no Motion to Strike the said Motion to extend time, and the exceptions of the Northern Pacific Railroad Company were filed on February 19th, 1938, prior to the hearing on the Motion to Extend Time; it is settled practice of the courts that when a Motion to Extend Time is filed for the performance of said Act, that if the Act is performed before the Motion is acted on, that the Motion to extend the time to the date of the actual filing will thereby, as a matter of course, be granted.

XV.

The Court ererd in striking pleadings to which there were no Motions to Strike, thus holding that the court, of its own motion, can strike a pleading.

XVI.

As the Court gave as one reason for striking the Answer and Cross-bill of the Northern Pacific Railroad Company, by Charles E. Schmidt, and other minority stockholders, and for denying leave to file the Intervening Petition, that the court had by the Decree of October 3, 1935, as amended January 29, 1936, confirming the Firt Report of Special Master, held that the Mortgages claimed to have been executed by the Northern Pacific Railroad Company, were valid (and called upon the Special Master in Open Court to confirm same) and as the Court thus erroneously construed and reviewed the decree of October 3, 1935, as amended January 29th, 1936, the Court erred in striking the said Answer and Cross-bill and in refusing leave to file said Intervening Petition, as a review and examination of the First Report of the Special Master and the Decree of October 3, 1935, as amended January 29, 1936, confirming said report, will clearly demonstrate that the Court did not attempt to, nor in any manner, determine that said mortgages were valid.

XVII.

The Court erred in striking out the Cross-bill and Answer of the Northern Pacific Railroad Company by Charles E. Schmidt and other minority stockholders, as facts alleged therein, and admitted as true, show the title of the Northern Pacific Railroad Company properties, lands and land grants had never passed out of the Northern Pacific Railroad Company, and that the Northern Pacific Railway Company had been absorbed by or was owned by the Northern Pacific Railroad Company, and that the Northern Pacific Railway Company was never organized, and Acts purporting to amend its charter were void and unconstitutional, and all that the Northern Pacific Railway Company attempted to do was *ultra vires* and void; that further, because the Northern Pacific Railroad Company had no power under its Charter or laws to sell or convey its properties or lands, or to give a long time lease on same, and the Northern Pacific Railway Company under the laws of Wisconsin and the other states, traversed by the Northern Pacific Railroad system was not given authority or power to purchase, receive or have turned over to it by lease or other contract, the said Northern Pacific Railroad Company property.

XVIII.

The Court erred in stating and holding that laches prevented the Northern Pacific Railroad Company from seeking to prevent in this suit the Northern Pacific Railway Company from unlawfully seizing and taking possession of lands under the land agent, or their value, which said land or land grants had not been heretofore seized or taken possession of or any title thereto given to the Northern Pacific Railway Company, and the same is not yet in its power or possession, and neither laches or the statue of limitations would begin to run until the Northern Pacific Railway Company actually obtained possession. The Court held this, notwithstanding the petitioners who filed an Answer and cross-bill began in 1897 and 1898, and have

continued persistently to date to have the rights of the Northern Pacific Railroad Company determined and possession of its Railroad System land grants and property, title to which has never gone out to the Northern Pacific Railroad Company, restored to the Northern Pacific Railroad Company; and further, that the minority stockholders on behalf of themselves and petitioners, and aided by them on November 21st, 1900, instituted a suit in the Circuit Court of the United States in the Southern District of New York, seeking relief sought in the answer and cross-bill, which suit is still pending and undetermined, and was recently revived by the Court in the name of the Executor of the Plaintiff, and further these petitioners had since 1900 continuously sought a Congressional Investigation so as to obtain the facts set out in the Answer and Cross-bill and Intervening Petition, which were hidden and secreted by the Northern Pacific Railway Company, and other facts, which are still hidden and secreted by the Railway Company and Petitioners believe they can state, without fear of successful challenge, that but for the continuous acts and efforts of the Petitioners, the Joint Congressional Committee investigation of 1925, resulting in the Act of June 25, 1929, would never have been obtained, or the Act passed, or this suit authorized but for such efforts of the Petitioners and information they furnished the Government.

XIX.

The Court erred in the Decree of March 2nd, 1938, in denying on the merits, and not striking the Motion to Dismiss the Bill and Amended Bill of Complaint, which Motion was filed by the Northern Pacific Railroad Company by Charles E. Schmidt and Minority Stockholders, March 17, 1938, and in not granting the Motion and giving leave to and requiring the plaintiff to file an amended Bill putting in issue the validity of the foreclosure of the mortgages claimed to have been executed by the Railroad Company and the other matters required by the mandate of

the Act of June 25, 1929, as set out in part in the said Motion, and as shown by the said Act.

XX.

The Court erred in holding that the United States was not estopped to object to or oppose the answer and cross-bill and the Motion to Amend same, or the intervening petition, or to move to strike or dismiss either because the Attorney General failed to put in issue or prosecute to determination the validity of the two foreclosures of the mortgages and the disputes set out in the last clause of Section 5 in the Act of June 25, 1929 (46 Stats. 41).

XXI.

The Court erred in holding that the Northern Pacific Railroad Company was not estopped to object to or oppose the Answer or Cross-bill, or Motion to Amend same, or the Intervening Petition, or move to strike either, because the Northern Pacific Railway Company illegally and unlawfully, without any power or authority under its Charter, or by any State Law to do so, had seized and is holding all of the property, lands and land-grants of the Railroad Company, except such as are involved in this suit and had unlawfully taken and placed the Northern Pacific Railroad Company in captivity under its domination and control, and while so illegally and unlawfully holding said Northern Pacific Railroad Company in such captivity, since 1897, the Northern Pacific Railway Company had filed, through its attorneys, a disclaimer of any claim or interest of the Northern Pacific Railroad Company in and to any properties, lands or land grants under the Act of July 2, 1864, and the Northern Pacific Railway Company is now in this suit seeking to and endeavoring to unlawfully and illegally seize and take possession of land or their value, of the Northern Pacific Railroad Company, which the Northern Pacific Railway Company had not heretofore been able to seize and take possession of as is shown by

the allegations of the Answer and Cross-bill and Intervening Petition, which allegations on the Motions are not denied, but admitted to be true.

XXII.

The Court erred in refusing to hold that as alleged in the Answer and Cross-Bill and Intervening Petition, and admitted, that when Congress passed the Act of June 25, 1929, it made it mandatory on the Attorney General, and the Court, to have determined in the suit under proper allegations in the Bill of Complaint, all the rights of the Northern Pacific Railroad Company, and the Northern Pacific Railway Company, as is shown by chairman Colton Report for the committee to the House, and as these matters were purposely left open for future determination by Act of July 1, 1898 (30 Stats. 620), and by the said Act Congress purposely agreed and gave its consent for the United States to be sued or to be a party to litigation between the Northern Pacific Railroad Company and the Northern Pacific Railway Company, as Congress construed the Act of July 2, 1864, and the Joint Resolution of May 31, 1870, to make it mandatory that the United States be a party to all suits and litigations involving the land, land grants and mortgages authorized thereunder, and that such rights could not be determined in any other litigation, as the United States could not be made a party to any other such litigation.

XXIII.

The Court erred in holding that it is now too late for the Answer and Cross-bill and Intervening Petition to be filed in this cause, notwithstanding it took the court, and parties, *five years, six months and twenty-eight days* from July 31, 1930, to January 29, 1936, to settle the pleadings, at a cost considerably in excess of $25,000.00, on January 29th, 1936, and until that time the minority stockholders did not definitely know, and could not know, that the At-

torney General, in dereliction of his duty, and the Mandate of Congress to him and the court, would ignore the mandatory direction of the Court requiring him to have all rights of the Northern Pacific Railroad Company and Northern Pacific Railway Company to the land, land grants and properties, and the validity of the foreclosure of the mortgages in 1875 and 1896 determined, and further, notwithstanding that the Northern Pacific Railway Company is now in this suit trying to illegally and unlawfully grab, take, seize and possess further and other lands, or their value of the Northern Pacific Railroad Company, while the Northern Pacific Railway Company holds the Northern Pacific Railroad Company in captivity.

XXIV.

The Court erred in stating in its decision that the Petitioners on behalf of the Northern Pacific Railway Company can come back into this cause to determine the ownership of the fund established after such fund is established, but refused to put in the Decree words confirming such decision, but used words which would be construed to create *res adjudicata* to further proceedings on behalf of the Northern Pacific Railroad Company in this cause, and in addition to that the court denied the Motion of the Northern Pacific Railroad Company to construe, modify and amend the Report of the Special Master filed July 26, 1937.

XXV.

The Court erred in sustaining the plaintiff's Exception numbered 12, involving Absaroka and Beartooth forest.

XXVI.

The Court erred in sustaining plaintiff's Exceptions No. 16 to 27, inclusive, and Nos. 38 and 39, involving substitution of base.

XXVII.

The Court erred in sustaining the plaintiff's Exception numbered 40, 43 (a), (b), (d) and (e), 44, 48, and 49, involving the availability of withdrawing lands for indemnity selection, and Nos. 55 and 56 involving Fort Ellis Military Reservation.

XXVIII.

The Court erred in overruling the Northern Pacific Railroad Company's Exception No. 1.

XXIX.

The Court erred in overruling the Northern Pacific Railroad Company's Exception No. 2, involving the Portland Oregon & Tacoma Washington overlap.

XXX.

The Court erred in overruling the Northern Pacific Railroad Company's Exception No. 3, involving losses in the Second Indemnity limits of a particular state.

XXXI.

The Court erred in overruling the Northern Pacific Railroad Company's Exception No. 4.

XXXII.

The Court erred in the Orders of March 9th, 1938, and of March 22nd, 1938, in striking out the Answer and Cross-Bill, in not permitting the filing of the Intervention Petition, and in not requiring the Northern Pacific Railway Company and plaintiff to answer same, and in not requiring the Northern Pacific Railway Company to answer the Interrogatories and produce the papers and documents called for in the interrogatories, as this Appellant is entitled, and it is necessary for appellant in preparation for the hearing on the ownership of the funds and property to be established, to have said data and documents.

In *Northern Indiana Railroad Company* vs. *Michigan Central Railroad Company,* 15 How. 233, 14 L. Ed. 674, it was held that where the Michigan Central Railroad Company, established in Michigan, made an agreement with the New Albany and Salem Railroad Company, established in Indiana, that the former would build and work a road in Indiana, under the charter of the latter.

Another Company, also established in Indiana, called the Northern Indiana Railroad Company, claiming an exclusive right to that part of Indiana, filed a bill in the Circuit Court of the United States for the District of Michigan, against the Michigan Company, praying an injunction to prevent the construction of the road under the above agreement.

The Circuit Court had no jurisdiction over such a case.

The subject matter of the controversy lies beyond the limits of the district, and where the process of the court cannot reach the *locus in quo.*

Moreover, the rights of the New Albany Company are seriously involved in the controversy, and they are not made parties to the suit. The Act of Congress, providing for the non-joinder of parties who are not inhabitants of the district, does not apply to such a case as the present.

The court, at p. 243 (679), said: "The controversy before us does not arise out of a contract, nor is it connected with a trust expressed or implied. An exclusive right is claimed by the complainants, under their charters, and the legislative Acts of Indiana connected therewith, to construct and use a railroad, as they have done, from the City of Michigan to the western line of the State. And they complain that the defendants have unlawfully entered upon their grounds, constructed a road crossing the complainants' road several times, and materially injuring it, by constructing a road parallel to it. Relief is prayed for an injury threatened or done to their real estate in Indiana, and to their franchise, which is inseparably connected with the realty in that State.

"In the investigation of this case, rights to real estate must be examined, which have been acquired by pur-

chase, or by a summary proceeding under the laws of Indiana. This applies, especially, to the ground on which the complainants' road is constructed, and to other lands which have been obtained, for the erection of facilities connected with their road. And, in addition to this, the chartered rights claimed by the defendants, and the right asserted by them to construct their road as they have done, crossing the complainants' road and running parallel to it, must also be investigated. Locality is connected with every claim set up by the complainants, and with every wrong charged aganist the defendants. In the course of such an investigation, it may be necessary to direct an issue to try the title of the parties, or to assess the damages complained of in the bill.

"It will readily be admitted, that no action at law could be sustained in the district of Michigan, on such ground, for injuries done in Indiana. No action of ejectment, or for trespass on real property, could have a more decidedly local character than the appropriate remedy for the injuries complained of. And is this changed by a bill in chancery? By such a procedure, we acquire jurisdiction of the defendants, but the subject matter being local, it cannot be reached by a chancery jurisdiction, exercised in the State of Michigan. A state court of Michigan, having chancery powers, may take the same jurisdiction, in relation to this matter, which belongs to the Circuit Court of the United States, sitting in the district of Michigan. And it is supposed that no court in that State could assume such a jurisdiction.

"But there remains another ground of objection to the jurisdiction in this case. The New Albany and Salem Railroad Company is not made a party to this suit."

In 1823 the nation, by the Supreme Court, through Chief Justice John Marshall, stated the rules and principles respecting the use and disposition of the lands and territory of the United States, intrusted by the Constitution to the Government and its Congress as follows: The right of discovery given by this Commission to Cabot is confined to countries then unknown to all Christian people, and of these countries, Cabot was empowered to take possession for and in the name of the King of England, thus asserting a right to take possession, notwithstanding the occupancy of the natives, who were heathens. To this discovery (by Cabot under his commission of 1796) the English traced their title, the Court said, "As the right of society to pre-

scribe those rules by which property may be acquired and preserved is not, and cannot be drawn into question; as the title to lands, especially, is and must be admitted to depend entirely on the law of the nation in which they lie; it will be necessary in pursuing this inquiry, to examine, not singly those principles of abstract justice, which the Creator of all things has impressed on the mind of His creature man, and which are admitted to regulate, in a great degree, the rights of civilized nations, whose perfect independence is acknowledged; but those principles also which our own government has adopted in the particular case, and given us as the rule for our decision".

Johnson vs. *McIntosh,* 21 U. S. 522, 5 L. Ed. 688.

The Government by Congress enacted in 1864, 1870, 1898 and 1929, the laws and principles applicable in this particular case as contained in the charter, with its various obligations as land grant contracts, etc., which is given to the courts as their guide in settling the rights of the interveners, as well as other parties in the present litigation.

In *Caldwell* vs. *Taggart,* 4 Peters 190, at 202, 7 L. Ed. 190, at 201, where a bill was filed to compel the execution of securities for money loaned, which securities, it was alleged in the bill, were promised to be given upon particular real estate purchased by the money loaned, and the complainants had omitted to make the prior mortgagees of the premises on which the securities were required to be given, parties to the bill, the court said: "In reply to all these grounds of reversal, for want of parties, or for want of due maturation for a final hearing, it has been urged that nothing is ordered to be mortgaged or sold beside Caldwell's own interest, whatever that may be. But this we conceive to be an insufficient answer. It is not enough that a court of equity causes nothing but the interest of the proper party to change owners. Its decrees should terminate and not instigate litigation. Its sales should tempt men to sober investment, and not to wild speculation. Its process should act upon known and definite interests, and not upon such as admit of no medium of estimation. It has the means of reducing every right to certainty and precision, and is, therefore, bound to employ those means in the exercise of its jurisdiction.

"There is no want of learning in the books on this subject. The general rule is laid down thus: 'However numerous the persons interested in the subject of a suit,

they must all be made parties plaintiffs or defendants, in order that a complete decree may be made; it being the constant aim of a court of equity to do complete justice by embracing the whole subject, deciding upon and settling the rights of all persons interested in the subject of a suit to make the performance of the order perfectly safe to those who have to obey it, and to prevent future litigation.' And again, 'all persons are to be made parties who are legally or beneficially interested in the subject matter and result of the suit', extending in most cases to heirs-at-law, trustees and executors.''

In *Minnesota* vs. *Northern Securities Co.,* 184 U. S. 199, at 244, 46 L. Ed. 499, at 519, the Court said: ''More briefly stated, the case presented by the charges and prayers of the bill is that the state of Minnesota is apprehensive that a majority of the stockholders, respectively, of the Great Northern Railway Company and of the Northern Pacific Railway Company have combined and made an arrangement, through the organization of a corporation of the state of New Jersey, whereby such a consolidation, or, what is alleged to amount to the same thing, a joint control and management of the Great Northern and Northern Pacific Railway Companies, shall be effected as will operate to defeat and overrule the policy of the state in prohibiting the consolidation of parallel and competing lines of railway, and, therefore, appeals to a court of equity to prevent by injunction the operation and effect of such a combination and arrangement.

''But at once, as we have seen, the court is put upon inquiry whether the parties and persons to be affected by such an injunction are before it.

''The narrative of the bill unquestionably discloses that the parties to be affected by a decision of the controversy are, directly, the state of Minnesota, the Great Northern Railway Company, the Northern Pacific Railway Company, corporations of that state, and the Northern Securities Company, a corporation of the state of New Jersey, and, indirectly, the stockholders and bondholders of those corporations and of the numerous railway companies whose lines are alleged to be owned, managed, or controlled by the Great Northern and Northern Pacific Railway Companies.

''Can such a controversy be determined, with due regard to the interests of all concerned, by a suit solely between the state of Minnesota and the Northern Securities

Company? It is, indeed, alleged that all of the stockholders of the Northern Securities Company are stockholders in the two railroad companies, and, therefore, it may be said that the latter stockholders are sufficiently represented in the litigation by the Northern Securities Company; but it is not alleged that the stockholders of the Northern Securities Company constitute or are composed of all the stockholders of the two railroad companies, and, in fact, the contrary is conceded in the allegations of the bill that a majority only of the stock of one, or perhaps both, of the two railroad companies is owned, or at least controlled and managed, by the Northern Securities Company. It is obvious, therefore, that the rights of the minority stockholders of the two railroad companies are not represented by the Northern Securities Company. They have a right to be represented in the controversy by the companies whose stock they hold, and their rights ought not to be affected without a hearing, even if it were conceded that a majority of the stock in such companies, held by a few persons, had assisted in forming some sort of an illegal arrangement. Moreover, it must not be overlooked that it is not the private interests of stockholders that are to be alone considered. The directors of the Great Northern and Northern Pacific Railway Companies are appointed to represent and protect, not merely the private and pecuniary interests of the stockholders, but the rights of the public at large, which is deeply concerned in the proper and advantageous management of these public highways. It is not sufficient to say that the attorney-general, or the governor, or even the legislature of the state, can be conclusively deemed to represent the public interests in such a controversy as that presented by the bill. Even a state when she voluntarily becomes a complainant in a court of equity cannot claim to represent both sides of the controversy. Not only have the stockholders, be they few or many, a right to be heard, through the officers and directors whom they have legally selected to represent them, but the general interests of the public, which hight be deeply affected by the decree of the court, are entitled to be heard; and that, when the state is the complainant and in a case like the present, can only be effected by the presence of the railroad companies as parties defendant.

"Upon investigation it might turn out that the allegations of the bill are well founded, and that the state is en-

titled to relief; or it might turn out that the allegations of the bill are well founded, and that the state is entitled to relief; or it might turn out that there is no intention or design on the part of the railroad companies to form any combination in disregard of the policy of the state, but that what is proposed is consistent with that policy and advantageous to the communities affected. But, in making such investigation, a court of equity must insist that both sides of the controversy shall be adequately represented and fully heard.

When it appears to a court of equity that a case, otherwise presenting ground for its action, cannot be dealt with because of the absence of essential parties, it is usual for the court, while sustaining the objection, to grant leave to the complainant to amend by bringing in such parties. But when it likewise appears that necessary and indispensable parties are beyond the reach of the jurisdiction of the court, or that, when made parties, the jurisdiction of the court will thereby be defeated, for the court to grant leave to amend would be useless. Sec. 2 of Article 3 of the Constitution of the United States.''

In the Bankhead Cotton Pool Act case of *Thompson* vs. *Deal*, 67 App. D. C. 327, 92 F. (2d) 478, 65 W. L. R. 734, the Court held:

(c) That the suit, being one brought to impress a fund with a trust and compel its restoration to those entitled thereto, was properly brought as a class suit.

(d) That the duress or *compulsion* exercised by the Manager of the Pool in requiring payments for the exemption certificates purchased from him was attributable to the depositors in the Pool, he being their agent and acting under an invalid law.

The Court said: 3rd. Nor do we think that there is any point in the objection made, but not strongly urged, that this is not properly a class suit. Here each of the appellants and every other person similarly situated has an identical interest in a single fund. Each bears the same relation to the fund, and a disposition of the case as to one will decide the rights of all. Appellants say the suit is not brought to rescind a contract of sale, but to restrain the completion of an unlawful statutory scheme participated in by appellees and by the depositors in the pool agreement to take appellants' money for the benefit of the depositors, and that the suit is brought to enjoin the further dissipation

of trust funds belonging to appellants to prevent appellees from paying such fund to innumerable persons not entitled to it, and thereby placing the fund beyond their reach.

We think the suit is in the nature of an action to impress a fund with a trust and compel its restoration, and we think it is properly brought as a class suit. Here there is an identity of parties and an identity of interests; if one of the appellants can recover, all can recover, and if they do not proceed as a class there must then be a multiplicity of suits. The governing rule is stated in *Hartford Life Insurance Co.* vs. *Ibs,* 237 U. S. 662-672, and *Watson* vs. *National Life & Trust Co.,* 162 F. 7.

4th. The argument on behalf of the government is that appellants were not coerced into doing business with Manager Deal. Counsel say that officer could not compel appellants to purchase certificates from the pool, that appellants could just as well have complied with the tax provisions of the Act, and in that case would have had recourse against the United States for the recovery of the taxes if the exaction was shown to be invalid. From these facts they draw the conclusion that appellants' purchase of pool certificates was due to their own voluntary desire to avoid payment of the tax and thus to save money. This, they say, is not duress. Summarized, the argument is that appellants are not seeking the recovery of money wrongfully exacted by the government or by some party acting in behalf of the government who has exerted compulsion upon them, but are seeking to recover money paid to entirely innocent third parties, who gave to appellants in return for their money property rightfully belonging to those third parties. But we think this contention cannot be sustained. The government had no right to limit the production of cotton or to use the taxing power exclusively to accomplish that end. We are not saying that a tax on the processing of cotton is objectionable; but the Bankhead Act did not impose a true tax and was not designed to raise revenue. It was—as it was intended to be—only a coercive measure supplemental to the Agricultural Adjustment Act.

The duress situation which the Supreme Court found to exist in the Act challenged in *United States* vs. *Butler,* is as apparent here as there. And as to the provisions of the Act there, the Court said: "The farmer, of course, may refuse to comply, but the price of such refusal is the loss of benefits. The amount offered is intended to be sufficient

to exert pressure on him to agree to the proposed regulation. *The power to confer or withhold unlimited benefits is the power to coerce or destroy.* If the cotton grower elects not to accept the benefits, he will receive less for his crops; those who receive payments will be able to undersell him. The results may well be financial ruin. The coercive purpose and intent of the statute is not obscured by the fact that it has not been perfectly successful. It is pointed out that, because there still remains a minority whom the rental and benefit payments were insufficient to induce to surrender their independence of action, the Congress has gone further and, in the *Bankhead Cotton Act,* used the taxing power in a *more directly minatory fashion to compel submission.* This progression only serves more fully to expose the coercive purpose of the so-called tax imposed by the present Act. * * * *This is coercion by economic pressure. The asserted power of choice is illusory.*" 297 U. S. 1, at 70, 71; 80 L. Ed. 477, at 491.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

No. 8893

CHARLES E. SCHMIDT ET AL., MINORITY STOCKHOLDERS OF THE NORTHERN PACIFIC RAILROAD COMPANY, Intervening Petitioners, *Appellants,*

vs.

UNITED STATES OF AMERICA, NORTHERN PACIFIC RAILWAY COMPANY, ET AL., *Appellees.*

Upon Appeal from the District Court of the United States for the Eastern District of Washington, Northern Division.

Motion to Dismiss and Brief of Appellees Northern Pacific Railway Company, Northern Pacific Railroad Company, Northwestern Improvement Company, Bankers Trust Company, City Bank Farmers Trust Company.

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MITCHELL, TAYLOR, CAPRON & MARSH,
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STATEMENT OF THE CASE.

This suit was filed by the United States on July 31, 1930 (R. 225). It was brought pursuant to the Act of June 25, 1929 (46 Stat. 41), to adjust the land grants made to the Northern Pacific Railroad Company by the Act of July 2, 1864, granting lands to aid in the construction of a railroad from Lake Superior to Puget Sound, and by the Joint Resolution of May 31, 1870, making an additional grant to aid in construction of a railroad from Portland to Puget Sound.

Sections 4 and 5 of the Act of June 25, 1929, are as follows:

> "Sec. 4. The provisions of this Act shall not be construed as affecting the present title of the Northern Pacific Railroad Company or its successors, the Northern Pacific Railway Company, or any subsidiary of either or both, in the right of way of said road or lands actually used in good faith by the Northern Pacific Railway Company in the operation of said road.
>
> "Sec. 5. The Attorney General is hereby authorized and directed forthwith to institute and prosecute such suit, or suits, as may, in his judgment, be required to remove the cloud cast upon the title to lands belonging to the United States as a result of the claim of said companies, and to have all said controversies and disputes respecting the operation and effect of said grants, and actions taken under them, judicially determined, and a full accounting had between the United States and said companies, and a determination made of the extent, if any, to which the said companies, or either of them, may be entitled to have patented to them additional lands of the United States in satisfaction of said grants, and as to whether either of the said companies is lawfully entitled to all or any part of the lands within the indemnity limits for which patents have not issued, and the extent to which the United States may be en-

titled to recover lands wrongfully patented or certified. In the judicial proceedings contemplated by this Act there shall be presented, and the court or courts shall consider, make findings relating to, and determine to what extent the terms, conditions, and covenants, expressed or implied, in said granting Acts have been performed by the United States, and by the Northern Pacific Railroad Company, or its successors, including the legal effect of the foreclosure of any and all mortgages which said Northern Pacific Railroad Company claims to have placed on said granted lands by virtue of authority conferred in the said resolution of May 31, 1870, and the extent to which said proceedings and foreclosures meet the requirements of said resolution with respect to the disposition of said granted lands, and relative to what lands, if any, have been wrongfully or erroneously patented or certified to said companies, or either of them, as the result of fraud, mistake of law or fact, or through legislative or administrative misapprehension as to the proper construction of said grants or Acts supplemental or relating thereto, or otherwise, *and the United States and the Northern Pacific Railroad Company, or the Northern Pacific Railway Company, or any other proper person, shall be entitled to have heard and determined by the court all questions of law and fact, and all other claims and matters which may be germane to a full and complete adjudication of the respective rights of the United States and said companies, or their successors in interest under said Act of July 2, 1864, and said joint resolution of May 31, 1870,* and in other Acts or resolutions supplemental thereto, and all other questions of law and fact presented to the joint congressional committee appointed under authority of the joint resolution of Congress of June 5, 1924 (Forty-third Statutes, page 461), notwithstanding that such matters may not be specifically mentioned in this enactment." (Italics supplied)

Section 7 provides that the suit shall be brought in a District Court of the United States within the states of Wisconsin, Minnesota, North Dakota, Montana, Idaho, Washington, or Oregon, as the Government may elect. Said Section 7 contains the following provision:

> "Any case begun in accordance with this Act *shall be expedited in every way,* and be assigned for hearing at the earliest practicable day in any court in which it may be pending. Congress shall be given a reasonable time, which shall be fixed by the court, within which it may enact such legislation and appropriate such sums of money as may be necessary to meet the requirements of any final judgment resulting by reason of the litigation herein provided for."

The bill of complaint is voluminous. All of the questions which the Attorney General thought appropriate to comply with said Act of 1929 are presented. On February 25, 1932 (the order is not printed in the record) this cause was referred to a Special Master to make a report, with findings and conclusions, on certain motions, demurrers and pleas filed by defendants against certain paragraphs of the complaint. The Master filed his report May 31, 1933 (R. 428-662).

The foreclosure and reorganization of 1875, so much discussed in appellants' brief, is presented by paragraphs IX, X, XI and XII of the complaint. The Master's report (R. 495) disposes of this issue, holding, in substance, that said proceedings of 1875 did not divest the Northern Pacific Railroad Company of any of its rights in the land grant, and that said company, the federal corporation, constructed and completed the railroad as required by said Act and Joint Resolution. However, as appellants were not stockholders

in 1875 and as the report is favorable to the Railroad Company, they are benefited, not prejudiced, by this finding.

The 1896 foreclosure is drawn in question by subdivision XVIII of the complaint and is disposed of by the Master's first report (R. 640 et seq.). The Master found that the mortgages issued pursuant to the Joint Resolution of May 31, 1870, were valid, and the foreclosure proceedings of 1896 and the deeds issued pursuant thereto, conveying said railroad and land grant to the Northern Pacific Railway Company, were valid. See also the Master's report on subdivision XIII of the complaint (R. 632-34).

The Master's report was in all things confirmed, the District Court overruling all exceptions. See Judge Webster's memorandum decision (R. 674) and the order of October 3, 1935, confirming the report (R. 680).

This order, of course, was merely interlocutory from which no appeal lay. Afterwards and on April 21, 1936 (R. 684), the court made a further order of reference to the Special Master, directing him to proceed with the hearing of the cause and to take evidence relative to all matters not covered by his prior report of May 31, 1933, except evidence relative to the value of the land and the amount of compensation due as provided by said Act of June 25, 1929, and report his findings and conclusions and recommendations for a decree.

On May 22, 1936, Congress passed a special appeal statute reading as follows:

> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That in the suit entitled United States of America, plaintiff, against Northern Pacific Railway Company and others, defendants, numbered E-4389, instituted and pending in the District Court of the United

States for the Eastern District of Washington, under the authority and direction of the Act of June 25, 1929 (ch. 41, 46 Stat. L. 41), now on reference to a special master for hearing under an order of said court entered in said suit on April 21, 1936, a direct review by the Supreme Court of the United States by appeal may be had by any party to said suit of any order or decree of said district court entered upon a review of the report of the master to be made pursuant to said order of April 21, 1936, and also of the order or decree of said district court entered in said suit on October 3, 1935, as amended by an order of January 29, 1936. Such direct review by the Supreme Court of either or both of the said orders or decrees may be had by appeal taken within sixty days from the date of the order or decree of the district court entered upon a review of the report of the master to be made pursuant to the said order of April 21, 1936. The right of review of any final judgment, authorized by said Act of June 25, 1929, shall continue in force and effect." (ch. 444, 49 Stat. 1369)

By this statute the interlocutory order confirming the Master's first report was made appealable and the decree to be entered on the Master's second report was likewise made appealable. The appeal from both orders is direct to the Supreme Court.

Pursuant to the order of re-reference the Master on July 26, 1937, filed his report on the adjustment of the grants (R. 686-887), covering the extent to which the United States and the railroad company had complied with the terms of the grants, the deficiency in the grants and the acreage for which the Railway Company is entitled to compensation, all as provided by said Act of June 25, 1929. This report did not, of course, determine the value of said lands nor the amount of compensation to which the Railway Company is

entitled as that issue was expressly excluded from the order of re-reference. It will be determined in a further re-reference after the decision of the Supreme Court on the two appealable orders has been handed down. Prior to that time it cannot be known, of course, whether the Master's report and the order of the District Court thereon made a correct determination of the deficiency and of the number of acres to which the Railway Company is entitled to compensation.

Both parties filed exceptions to the Master's second report, defendants on August 9, 1937 (R. 887), and plaintiff on August 13, 1937 (R. 893). By order filed March 22, 1938, the court passed upon most of these exceptions, sustaining some and overruling others (R. 1211-1216). The last paragraph of the order (R. 1215), expressly provides that there are additional matters connected with the Master's report yet to be considered before the review of said report may be completed and the decree entered of which the Supreme Court is given jurisdiction to review by said Act of May 22, 1936, and the court retains jurisdiction of the case for the purpose of determining said matters and to make findings of fact, and conclusions of law, all as provided by said Act of June 25, 1929. The effect of this order is that this cause is still pending before the District Court for the purpose of deciding certain unsettled issues and for settling findings and conclusions and a form of decree preliminary to the direct appeal to the Supreme Court from both orders, that is, the order entered confirming the Master's first report and the order or decree to be entered on the Master's second report.

At this place further explanation is necessary. Until the special appeal statute of May 22, 1936, the order confirming the Master's first report was purely interlocutory. No findings, conclusions or decree or statement of evidence or other steps

were taken, which are ordinarily incident to an appeal. It was not known at that time that an appeal ever could or would be taken from that order. Had that order been appealable at the time it was entered, it would have been supported undoubtedly by appropriate findings, conclusions and a proper decree. This omission it is expected will be supplied by the decree to be entered on the Master's second report after the unsettled matters have been decided and findings, conclusions and decree have been prepared and signed by the court. What we wish now to emphasize is that the matters which must be determined in accordance with Section 5 of the Act of June 25, 1929, have not yet been determined because of certain issues which must be determined before findings, conclusions and final decree can be entered in the District Court. The findings, conclusions and decree which will be entered will fully comply with said Act of June 25, 1929. This is sufficient answer to all of appellants' contentions based upon the claim that the District Court has not complied with the Act of 1929.

After the exceptions to the Master's second report had been filed, as stated, but before the court ruled thereon, these appellants on September 3, 1937, filed what they called, "Answer and Cross Bill of the Northern Pacific Railroad Company by Charles E. Schmidt and Other Minority Stockholders of said Railroad Company", (R. 952-1030). By this document they pretend to answer the complaint for the Northern Pacific Railroad Company, which was made party by the complaint filed in July, 1930, and had in due time appeared in the cause by its duly authorized counsel. Besides the answer, this document asserts a so-called cross-bill by which appellants seek to litigate certain claims as minority stockholders of the old Northern Pacific Railroad Com-

pany, contending that the foreclosure of the mortgages executed by that company and the sale of the railroad and land grant to Northern Pacific Railway Company in 1896 were invalid. The position asserted is that the Railroad Company is the owner of the railroad and the land grant as against the Railway Company, and they seek to adjudicate in this cause the internal disputes of the stockholders of the Northern Pacific Railroad Company and the Northern Pacific Railway Company. Appellants' Brief, p. 4 of Index, points 16, 19 to 22. See also prayer of cross-bill (R. 1024).

On motion of both plaintiff (R. 1030) and defendants (R. 1032) this so-called answer and cross-bill was stricken from the files by order dated March 9, 1938 (R. 1187). The ground of plaintiff's motion was that no leave had been asked or obtained as required by District Court Rule 21, and on the ground that no cause of action was stated against the United States (R. 1030). The grounds of defendants' motion were, among others, that said parties may appear by complaint in intervention only after leave therefor has been asked and given under Equity Rule 37; that said cross-bill had not been filed within the time fixed by Rule 21; that the taking of evidence in this case has been commenced and has been completed and said cross-bill comes too late; that said issues set up by said cross-bill are not germane to nor in any way related to the subject matter of the complaint and cannot be asserted in this cause.

By said order of March 9, 1938, both motions were sustained and the so-called answer and cross-bill stricken. The last paragraph of said order is as follows (R. 1189):

> "It is further ordered, that this order shall be without prejudice to the right of said Charles E. Schmidt, George Landell, executor of E. A. Landell, deceased, Clarence Lobenthal, trustee of Bernard Lobenthal, and

Walter L. Haehnlen, themselves or as representatives of other stockholders of said Northern Pacific Railroad Company, or of such other stockholders themselves, to assert in any other proceeding any rights which they may have by reason of the matters and things alleged in said answer and cross-bill and in said intervening petition."

After filing of said answer and cross-bill and after plaintiff's and defendants' motions to strike had been filed, but before the motions were passed on, and on January 31, 1938, appellants filed petition for leave to intervene herein (R. 1037-1175). This so-called petition adopted paragraphs 43 to 67 of the cross bill which has been stricken from the files and is no proper part of the record in this cause, although much quoted by appellants in their brief. This petition again sets up claims arising out of appellants' alleged status as stockholders of Northern Pacific Railroad Company. Upon the objections of plaintiff and defendants the petition for leave to intervene was denied by the same order of March 9, 1938 (R. 1188) which also struck out the so-called answer and cross-bill. This order, as above shown, expressly provides that it is without prejudice to the rights of these appellants or any other alleged stockholders to assert in any other proceeding any rights they may have by reason of the allegations of said cross-bill and petition for leave to intervene.

After these orders were made these appellants still persisted in filing various documents and leave so to do was denied and said documents stricken from the files by the order dated March 22, 1938 (R. 1209). The last paragraph of said order of March 22, 1938, again expressly provides that it is without prejudice to the right of these appellants or any of them to assert any rights which they may have by

reason of the matters alleged in said answer and cross-bill and in said intervening petition. It reads as follows:

> "It is further ordered, that this Order shall be without prejudice to the right of said Charles E. Schmidt, George Landell, executor of E. A. Landell, deceased, Clarence Lobenthal, and Walter L. Haehnlen, themselves or as representatives of other stockholders of said Northern Pacific Railroad Company, or of such other stockholders themselves to assert later in this cause, when the fund, if any, to be distributed by the United States is established and fixed or in any other proceeding, any rights which they may have by reason of the matters and things alleged in said answer and cross-bill and in said intervening petition."

The next step these appellants attempted to take was an appeal to the Supreme Court. An appeal was allowed by the District Court but afterwards rescinded. Thereupon they applied to the Chief Justice of the Supreme Court of the United States for leave to appeal from said order of March 9, 1938, which struck out the cross-bill and denied leave to intervene. Though not shown of record on this appeal (but mentioned in the appendix to appellants' brief, p. 35), this petition was denied. The notation is found in 58 S. C. R. 1036, June 15, 1938. Upon this denial, petition for leave to appeal to this court, supported by the same documents, was presented and allowed in part by Judge Wilbur by order dated July 5, 1938 (R. 1271) as follows:

> "The petition of Charles E. Schmidt, et al., for leave to appeal from that portion of the order of March 9, 1938, denying leave to intervene, is granted; insofar as it requests leave to appeal from other portions of the order of March 9, 1938, and from other orders is denied; cost bond fixed at $500; no supersedeas allowed."

It thus appears that the only question now before this court is denial of petition for leave to intervene.

Motion to Dismiss.

Appellees, Northern Pacific Railway Company, Northern Pacific Railroad Company, Northwestern Improvement Company, Bankers Trust Company, and City Bank Farmers Trust Company, move the court to dismiss this appeal for the following reasons:

I.

This court has no jurisdiction of an appeal by Charles E. Schmidt et al. from the order of the District Court of March 9, 1938, denying leave to intervene herein because Section 7 of the Act of June 25, 1929 (46 Stat. 41) provides that this cause shall be expedited and the Act of May 22, 1936 (49 Stat. 1369) provides that an appeal may be taken direct to the Supreme Court from the order of October 3, 1935, and the order or decree entered upon a review of the report of the Master made pursuant to the order of April 21, 1936, within sixty days from the date of said last mentioned order.

II.

Appellants have not complied with Equity Rule No. 75. No praecipe indicating the portions of the record to be incorporated into the transcript on appeal was served upon these appellees or any of them or upon any solicitor of these appellees or any of them, and no such praecipe was filed with the Clerk of the United States District Court for the Eastern District of Washington, Northern Division, from which court this appeal is prosecuted.

III.

Appellants have not complied with Rules No. 14 and 16 of this Court. No transcript of the record in the court below containing the papers, documents and proceedings required by said Court Rule No. 14 has been made up by the Clerk of the United States District Court, and no transcript of the record as required by Rule No. 16 has been filed in this court.

The Clerk of said United States District Court has not made a certificate to the effect that he was returning a true copy of all the papers, documents and proceedings prescribed by Rule No. 14 of this court for the transcript of the record.

IV.

Appellants have not complied with Paragraph (b) of Equity Rule No. 75 and Rule No. 14 of this court in that no condensed or narrative statement of the evidence taken in the court below and necessary for consideration in this Court of the matters included in the assignment of errors has been settled or filed with the Clerk of the Court below, or included in the papers filed in this Court as a pretended record.

Argument on Motion to Dismiss.

1. It has been shown in the statement that this cause was brought under the Act of June 25, 1929, having for its object the adjustment of the land grants to Northern Pacific Railroad Company and determination of the compensation to which the Railway Company is entitled by reason of the withdrawal of indemnity lands and expropriation thereof by the United States. Section 7 provides that the case "shall be expedited in every way, and be assigned for hearing at

the earliest practicable day in any court in which it may be pending." The expediting provision is followed out in the Act of May 22, 1936 (49 Stat. 1369) by giving an appeal direct to the Supreme Court from the order of court confirming the Master's first report, and as well, from the decree (when it shall have been entered) on the Master's second report. As stated, the order or decree to be entered on the Master's second report has not yet been entered and the cause is still pending in the District Court for that purpose. Appellees submit that the only appeal which may be taken in this cause is an appeal direct to the Supreme Court from the said two orders and decrees of the District Court. To hold otherwise will be to defeat the provision for expediting this cause, contained in the Act of 1929, and the provision for direct appeal to the Supreme Court.

United States v. California Canneries, 279 U. S. 553, was a writ of certiorari to review an order of the Court of Appeals of the District of Columbia permitting intervention in a suit under the anti-trust act. The case is a sequel to *Swift & Co. v. United States*, 276 U. S. 311, a suit under the anti-trust act, in which consent decree was entered. Five years later defendants moved to vacate the decree. That proceeding came to the Supreme Court and the petition to vacate was denied. Thereafter the Canneries moved to suspend operation of the consent decree and to be allowed to intervene on the ground that the consent decree interfered with the performance by Armour & Co., one of the defendants, of a contract by which Armour & Co. agreed to buy large quantities of canned fruit. The Supreme Court of the District denied leave to intervene and the Court of Appeals reversed. The Supreme Court, on certiorari, held that Con-

gress by the expediting act sought to insure speedy disposition of suits in equity by the United States under the anti-trust act. The decision refers to opportunities for delay under the statutes of appeal and the purpose of Congress to avoid this delay and expedite the decision. The court said:

> "The purpose of Congress to expedite such suits would obviously be defeated if in the District of Columbia an appeal lay to the Court of Appeals from a denial of a motion for leave to intervene. * * * Even under the Act of 1891, c. 517, in cases where the appeal was taken direct to this Court from the final decree in the trial court, every appeal thereafter taken in the cause was necessarily also to this Court. *Arkadelphia Milling Co. v. St. Louis Southwestern Ry. Co.*, 249 U. S. 134, 140-142; *St. Louis, Iron Mountain & Southern Ry. Co. v. Hasty*, 255 U. S. 252, 254. Compare *St. Louis, Iron Mountain & Southern Ry. Co. v. McKnight*, 244 U. S. 368." (p. 559).

The expediting provision of the anti-trust act is quoted in the margin of 279 U. S. at p. 557. That act provides that the appeal "will lie only to the Supreme Court." The special appeal act of May 22, 1936, provides that a direct review by the Supreme Court "may be had." This difference in words is without legal significance. In the first place, the word "may" must be taken to mean "shall". But were it otherwise, it is plain that the right to appeal is given to both plaintiff and defendants. When the final decree is entered on the Master's second report, either party has the right to appeal to the Supreme Court within sixty days. It is plain, of course, that plaintiff could not appeal to the Supreme Court and defendants appeal to the Court of Appeals, although both have an equal right of appeal. The only appeal contemplated is

a direct appeal to the Supereme Court. Certainly this court would have no jurisdiction of an appeal by plaintiff or defendants from said orders. No court would have jurisdiction of such an appeal as both of said orders are interlocutory, except for the Act of May 22, 1936. Therefore, no appeal will lie except the appeal given by that act and that appeal must be direct to the Supreme Court. The Supreme Court thus having jurisdiction, it follows that all appealable orders entered in this cause are appealable only to the Supreme Court.

In the *Arkadelphia Case,* cited in the *Canneries Case*, it appears that the Supreme Court had held that a certain reduced rate order was valid. Upon going down of the mandate the shippers who paid the higher rate intervened in the case, claiming damages on the railroad company's supersedeas bond. The District Court allowed the claims of some and disallowed the claims of others. The parties aggrieved desired to appeal, and, being in doubt whether the appeal lay to the Supreme Court or to the Court of Appeals, prayed for and were allowed an appeal to both courts. It is held that as the main action is appealable directly to the Supreme Court, so also were any subsequent decrees made in a subordinate action or one ancillary to the main cause. The court said:

> "The present appeals relate to a decree made in a subordinate action ancillary to the main causes, in which, as has been stated, the federal jurisdiction was invoked solely upon the ground that the cases arose under the Constitution of the United States. It has been held repeatedly that jurisdiction of subordinate actions is to be attributed to the jurisdiction upon which the main suit rested, and hence that where jurisdiction of the main cause is predicated solely on diversity of

citizenship and the decree therein is for this reason made final in the circuit court of appeals, the judgments and decrees in the ancillary litigation also are final. *Rouse v. Letcher,* 156 U. S. 47; *Gregory v. Van Ee,* 160 U. S. 643; *Rouse v. Hornsby,* 161 U. S. 588; *Oppe v. Louisville, &c. Ry. Co.,* 173 U. S. 573, 577.

"The proceeding out of which the decree now in question arose was not merely ancillary but was in effect a part of the main causes, taken for the purpose of carrying into effect the decrees of this court reversing the final decrees in the main causes and, at the same time, for the purpose of giving effect to a reservation of jurisdiction by the court below as contained in those final decrees. The supplementary decree that is now before us, since it simply brings to a conclusion those former suits pursuant to our decrees therein, must be treated as involving the construction and application of the Constitution of the United States and as being made in a case in which a state law was claimed to be in contravention of the Federal Constitution, within the meaning of § 238, Judicial Code." (p. 142)

We think this case decisive of the proposition that where the Supreme Court has jurisdiction by direct appeal, jurisdiction of every other court is excluded. It will be noted that the special act refers only to the two orders in question. The final decree in the case, fixing the amount of compensation is yet to be entered. The *Arkadelphia Case* seems clearly to point out the court in which the appeal from that decree, if any be taken, must go. We say this, not because it is now important but in case it should be argued that the special appeal statute contemplates a direct appeal from these two orders only. It is held in the *Cannerics Case* that the rule applies to an appeal from an order granting or refusing leave to intervene.

The appellants, evidently recognizing the jurisdiction of the Supreme Court to allow an appeal, applied to that court and their application was denied. The matters presented to this court were the same as those presented to that court. The denial of the appeal should be taken as conclusive that the Supreme Court believed that the District Court correctly disposed of appellants' efforts to appeal from the order of the District Court refusing leave to intervene. Certainly the Supreme Court under the canon of the *Arkadelphia Case* had jurisdiction to allow the appeal if the application were otherwise meritorious.

Appellants insist that they have a legal right to intervene by virtue of the provisions of Section 5 of Act of 1929, *supra*. Passing the point that if they did have such a right, they have long since waived it by not making timely appearance, the legal effect of the foreclosure to be considered and determined is limited to its bearing on the adjustment of the grant, the only issue with which the United States is concerned. The Act requires the court to make findings and determine.

> "to what extent the terms, conditions, and covenants, expressed or implied, in said granting Acts have been performed by the United States, and by the Northern Pacific Railroad Company, or its successors, including the legal effect of the foreclosure of any and all mortgages which said Northern Pacific Railroad Company claims to have placed on said granted lands by virtue of authority conferred in the said resolution of May 31, 1870, and the extent to which said proceedings and foreclosures meet the requirements of said resolution with respect to the disposition of said granted lands, etc."

Obviously this relates only to the legal effect of the foreclosure on the disposition by the Railway Company of the grant-

ed lands and its performance of the terms of the grant. The specific point to which this language must have been directed relates to the so-called $2.50 proviso of the Joint Resolution, reading as follows:

> "*Provided,* That all lands hereby granted to said company which shall not be sold or disposed of or remain subject to the mortgage by this act authorized, at the expiration of five years after the completion of the entire road, shall be subject to settlement and preemption like other lands, at a price to be paid to said company not exceeding two dollars and fifty cents per acre; and if the mortgage hereby authorized shall at any time be enforced by foreclosure or other legal proceeding, or the mortgaged lands hereby granted, or any of them be sold by the trustees to whom such mortgage may be executed, either at its maturity or for any failure or default of said company under the terms thereof, such lands shall be sold at public sale, at places within the States and Territories in which they shall be situate, after not less than sixty days' previous notice, in single sections or subdivisions thereof, to the highest and best bidder."

This issue was disposed of by the Master by paragraph XVIII of his first report (R. 628), and confirmed by the order of October 3, 1935.

The underscored language near the end of Section 5 of the Act of June 25, 1929, quoted *supra*, providing that the United States and the two railroad companies "or any other proper person" shall be entitled to have heard and determined by the court all questions of law and fact and all claims and matters which may be germane to a complete adjudication of the respective rights of the United States and said companies under said Act of July 2, 1864, and said Joint Resolution of May 31, 1870, obviously means only

questions which are germane to an adjustment of the grant. The questions to be adjudicated must be those which are germane to an adjudication of the rights of the United States and said companies arising out of and under said Act of July 2, 1864, and said Joint Resolution of May 31, 1870. As has been shown, this issue has been fully determined by the Master's first report and the law fully complied with.

The Master took the same view of the scope of the Act of June 25, 1929, in his first report. He concludes his discussion of the act (R. 453) as follows:

> "It will be seen from the foregoing abbreviation that in the contemplated litigation directed, it was intended every question from the organization of the company to the date of the Act that had been, or that now might be raised, should be presented to the Court and finally determined; and that upon such determination should be based an adjustment of the grant."

The claims of these appellants as stockholders of the old Railroad Company to the railroad and land grant and all other assets, does not arise out of the Act of July 2, 1864, or the Joint Resolution of 1870. They arise out of their claimed status as stockholders. But as often said, if it were otherwise, they should have come in at the proper time, and not when the case has been disposed of, and to have it reopened and delayed would be in defeat of the expediting requirements of the Act of 1929.

Not only are these appellants' claims not included in the Act of 1929, but they are contrary to the express provisions of Section 4. Note that Section 4 provides that the Act shall not affect the present title of the Northern Pacific Railroad Company or its successors, the Northern Pacific Railway Company, etc., to the right of way of said road or lands

actually used in good faith by the Northern Pacific Railway Company in the operation of said road. Thus the Act recognizes the title of the Railway Company to the railroad, station grounds and appurtenances. Yet appellants contend that they are authorized by that same act to litigate in this case claims of the Railroad Company or its stockholders, or an insignificant fraction of the stockholders, to the railroad and right of way, title to which is expressly excluded from the scope of the suit required to be brought by the Act. In other words, only an adjustment of the rights of the respective parties in and to the land grant is involved in this case, to the complete exclusion of any inquiry concerning the right of any one in and to the railroad and right of way, station grounds, etc. Of course, if appellants' view of this statute is correct, there is no conceivable claim held by anyone against the railroad or Railway Company which could not be presented in this case.

2. Equity Rule 75 begins:

"In case of appeal:

"(*a*) It shall be the duty of the appellant or his solicitor to file with the clerk of the court from which the appeal is prosecuted, together with proof or acknowledgment of service of a copy on the appellee or his solicitor, a *praecipe* which shall indicate the portions of the record to be incorporated into the transcript on such appeal. Should the appellee or his solicitor desire additional portions of the record incorporated into the transcript, he shall file with the clerk of the court his *praecipe* also within ten days thereafter, unless the time shall be enlarged by the court or a judge thereof, indicating such additional portions of the record desired by him."

Appellants made no attempt to serve upon appellees or any of them a praecipe and to file a praecipe with the Clerk. Instead of observing the rule appellants obtained from the Clerk a number of certified copies and his certificate to the correctness of the copies and that he had been paid required fees. Parties taking an appeal cannot make up a record to suit themselves without regard to rules and practice of the court. The Supreme Court so held long ago. *Railroad Company v. Schutte,* 100 U. S., at page 647.

There were more urgent reasons than ordinarily in case of appeal why here Equity Rule 75 should be observed as to the praecipe and as to a simple condensed statement of the evidence necessary for consideration of the errors urged. The petition to intervene was filed January 31, 1938, more than seven years after this suit was commenced, July 31, 1930. Before the stockholders took any steps to intervene the Special Master had filed two lengthy reports, each of them preceded by the taking of voluminous evidence. The District Court, in sustaining and adopting the first report of the Master, ruled upon a large number of exceptions. The second report of the Master passed upon every issue remaining in the case except the value of land for which any party might be entitled to compensation. So obviously a transcript of the record made up under the applicable rules and practice of the Court was a necessity for a hearing in this Court.

In discussion of the praecipe, in Cyclopedia of Federal Procedure, Vol. 6, Sec. 2836, the writer says:

> "Since the statement of evidence when approved is to be filed and then constitutes a part of the record, the praecipe should designate it as a part to be included. It thus appears that there are two kinds of differences to be settled under the direction of the judge, i. e., differ-

ences as to the 'general contents of the record' and differences as to the evidence to be stated or the form of it. Both of these are to be settled in the same general way by the judge's directions. It will be seen also that the praecipe practice resembles that prescribed for determining what shall be embodied in the printed record above, which requirement of praecipes was added to the Supreme Court rules in 1911, applying to both law and equity records on appeal, but with the addition of power to the trial judge in equity to settle disputes and give directions. All these praecipes are the means of selecting and carrying into the appellate record the necessary and essential proceedings. The rules are not designed to exclude any of them, but to exclude what is unnecessary, and they plainly indicate that intention when read together."

The Equity Rules have the force of a statute. Their provisions cannot be disregarded.

Roosevelt v. Missouri Life Ins. Co., (8 C. C. A.) 70 Fed. (2d) 945.

Humphrey v. Helgerson, 78 Fed. (2d) 485.

Buessel v. United States (2 C. C. A.), 258 Fed. 824.

3. No transcript of the record has been filed that conforms to Rules 14 and 16 of this Court. Rule 14, paragraph 1, is:

"1. The clerk of the court from which an appeal has been taken shall make a return of the same by transmitting a true copy of the record, opinion or opinions of the court, bill of exceptions, or statement of evidence and assignment of errors, and all proceedings in the case, under his hand and the seal of the court."

In paragraph 3 of Rule 14 it is provided that no case will be heard until a complete record containing all papers, ex-

hibits, depositions and other proceedings necessary to hearing in this court shall be filed.

Rule 16, paragraph 1, in part reads:

> "1. It shall be the duty of the appellant to file the record thereof and docket the case with the clerk of this court at San Francisco, Calif., before the return day in vacation or in term time. But for good cause shown the trial judge, or, in the event of his absence or disability, any other judge of the trial court, or any judge of this court may enlarge the time before its expiration, the order of enlargement to be filed with the clerk of this court."

There is no certificate of the clerk that he has made a return as required by Rule 14. The pretended transcript of copies filed by appellants in this Court does not conform to the requirements of Rules 14 and 16. In the absence of a praecipe and with no kind of statement of the evidence the clerk of the District Court was helpless in making up a transcript of the record. The printed so-called record contains 3 certificates of the clerk affirming the correctness of certain annexed copies. Those certificates manifestly are insufficient and of no force on this point.

In Simkins Federal Practice, (Schweppe Edition, 1934), Section 996, the writer says that if the appellee thinks the transcript is defective, he should resort to certiorari to bring up a complete record. This statement apparently has application if there is a transcript, prima facie lawful, in the appellate court.

In *Meyer v. Implement Co.* (5th C. C. A.), 85 Fed. 874, an equity case, the appeal was dismissed on motion urging that no properly authenticated transcript had been filed. The Clerk's certificate merely recited that "the foregoing

was a true copy of the following, namely:" On pages 875-6 the court says:

> "This court, in order to maintain an appeal upon its docket, must have at least prima facie proof that it has a lawful transcript before it. The prima facie showing results from an unqualified certificate of the clerk, from a stipulation of the parties, or from a direction by the appellant's counsel. It will be presumed, in the case of stipulations, that the parties have been careful to bring up all the papers necessary from the standpoint of either side of the controversy; and the clerk and the appellant's counsel, being officers of the court, are presumed to see that a lawful transcript is lodged in this court. Where a transcript prima facie lawful is before the court,—as in the case above cited of Nashua & L. R. Corp. v. Boston & L. R. Corp., a motion to dismiss the appeal will not be entertained, and the dissatisfied party must resort to the writ of certiorari. But when, as in the case before us, not even a prima facie transcript has been filed in this court, the proper action is to dismiss the appeal. Where the clerk certified to a full transcript, and it was urged that the transcript was incomplete, the supreme court held that the transcript was prima facie lawful, and that the deficiencies, if any, might be supplied by certiorari. The Rio Grande, 19 Wall. 188."

In Simkins Federal Practice, Sec. 995, page 902, the writer says:

> "An authenticated transcript of the record, assignment of errors, and all proceedings in the case, under the hand of the clerk and seal of the court, should be transmitted to the appellate court by the clerk.
>
> "The clerk's certificate must show that the transcript is complete, and not simply that the matters contained in the transcript are correct copies, or it must show that the record as sent up was designated by the stipula-

tions of counsel, or that the clerk was guided by equity rule 75 in preparing the transcript and selecting the papers necessary to a hearing."

In *Dixon v. Brown,* (5 C. C. A.) 9 Fed. (2d) 63, the appellant did not file with the Clerk of the Appellate Court a transcript of the record of the lower court, certified by the Clerk of that court, as required by 36 Stat. 901, Sec. 865, Title 28 U. S. C. A. The appellant delayed until after argument of the case was entered upon before taking action to compel the Clerk of the lower court to certify a printed transcript of the record. The court says that what was printed and filed was not a true copy of the transcript of the record in the cause because it was disclosed that entire orders of the lower court and other documents referred to in those orders were omitted; that in the absence of authenticated evidence of the record made by the lower court the appellate court could not properly undertake to review that record. The appeal was dismissed.

It is submitted that the motion to dismiss should be granted.

Argument on the Merits.

1. The intervention was properly denied for the reason that appellants sought to impeach proceedings had in the cause long prior to the attempt to intervene. It is shown in the opening statement that these parties made no effort to appear in this cause until after the Master had filed his second report on July 26, 1937. Then they sought to come in without motion or leave, by so-called answer and cross-bill. This document was stricken by the order of March 9, 1938. This court did not allow an appeal from that portion of the order. The petition for leave to intervene was not

filed until January 31, 1938. The intervention seeks to attack proceedings had in the cause long prior to the date it was filed. By the order of court confirming the Master's first report, the successorship of the Railway Company and its ownership of the railroad, and of the land grant and of all the property of the Railroad Company was adjudicated between the United States and defendants. See Master's first report, R. 646-648. If these parties ever had a right to assert in this proceeding their alleged rights as stockholders of the old Railroad Company on the ground that the mortgages given by that company and the foreclosure thereof and the deeds of conveyance from the trustees, the Master, and the Railroad Company to the Railway Company pursuant to said foreclosure decrees were invalid, they should have presented their contentions in due time after this suit was commenced by the United States. Now, after years of delay and after, at great pains and expense, the issue in which these appellants now assert a right to be heard, has been determined, they seek to attack that determination and retry this cause from its very beginning. If these parties are now allowed to intervene and assert the cause of action described in the intervention, much of the proceedings leading up to the Master's first report was waste motion. It is well settled, as of course it must be, that an intervention coming at this stage of the case is too late. In the *Canneries Case* the court, referring to the decision of the Court of Appeals allowing intervention, said:

> "Nor did it refer to the settled rule of practice that intervention will not be allowed for the purpose of impeaching a decree already made." (Citing many cases) (p. 556)

These appellants were not parties to the proceedings leading up to the Master's first report and have taken no exceptions to that report. It is well settled that the court's order confirming this report has become the law of this case and no party can now question it. If the parties to the cause cannot question it, certainly those who are not cannot now come in and question it. Nothing now remains to be done with respect to the Master's first report except to make the formal findings and conclusions and decree as required by Section 5 of the Act of June 25, 1929. As heretofore noted, those findings would have been made at the time the exceptions were passed upon but for the fact that at that time the order was merely interlocutory and did not become appealable or need to be supported by such findings until the Act of May 22, 1936, was passed. By virtue of that Act this order became appealable and it will be appropriate now to make findings required by the Act of 1929 as well as by the Equity Rules. On these findings and conclusions the court will enter a final decree from which an appeal can be taken direct to the Supreme Court. Certainly there is no hardship worked upon appellants because the court was careful to provide in the two orders above referred to that denial of the intervention at this time should in no way prejudice the right of these appellants to assert in any other proceeding, even in this proceeding hereafter, any rights that they may have by reason of the matters alleged in the so-called cross-bill as well as in their proposed intervention.

2. The intervention was properly denied for the reason that the asserted rights of appellants as stockholders of the Railroad Company in and to the property now owned and operated by the Railway Company and the alternative relief by way of judgment for the value of their stock, are not ger-

mane to the causes of action asserted in the bill of complaint. It is well settled, of course, that one cannot come into a case between others and assert rights foreign to the cause of action pending between plaintiff and defendants.

In *Chandler & Price Co. v. Brandtjen & Kluge, Inc., et al.*, 296 U. S. 53, Brandtjen & Kluge brought the suit against one Freeman, alleging that plaintiff was the owner of a certain patent for an improvement on a printing press and that defendant was using an infringing press. Injunction and accounting were prayed for. Before answer, Chandler and Price Co. applied for leave to intervene, showing to the Court that it was the manufacturer of and sold the printing press to the defendant and other facts. Intervention was allowed and the defendant and intervener filed a joint answer. The intervener set up a counterclaim against plaintiff, alleging that plaintiff was infringing a patent owned by the intervener and injunction and accounting were prayed. The original defendant had no interest in the patent owned by the intervener and the original bill did not allege any cause of action nor pray judgment against the intervener. On motion the counterclaim was dismissed. The ruling was sustained by the Circuit Court of Appeals. The Court, in its opinion, says:

> "There is no suggestion that defendant has any interest in the counterclaim or that the issues between intervener and plaintiff that are tendered by, or that might possibly arise out of, the counterclaim may not be adjudged in a separate suit. The intervenor was not entitled to come into the suit for the purpose of having adjudicated a controversy solely between it and plaintiff. Issues tendered by or arising out of plaintiff's bill may not by the intervenor be so enlarged. It is limited

to the field of litigation open to the original parties" (pp. 57-58).

"It is essential that the applicant shall claim an interest in the matters there in controversy between the plaintiff and original defendant. The purpose for which permission to intervene may be given is that the applicant may be put in position to assert in that suit a right of his in respect of something there in dispute between the original parties. Intervenor's counterclaim, involving nothing in which defendant is concerned, does not constitute the interest referred to in Rule 37.

"Exclusion from the litigation of that demand is consonant with reason and in the interest of justice. Introduction by intervention of issues outside those that properly may arise between the original parties complicates the suit and is liable to impose upon plaintiff a burden having no relation to the field of the litigation opened by his bill." (p. 59).

In *King v. Barr*, 262 Fed. 56 (9th C. C. A.) the third paragraph of the syllabus reads as follows:

"Where the final decree in a suit involving the receivership of a corporation to satisfy mortgage demands had been entered some six months before a bondholder filed an application to intervene which challenged the validity of the entire proceeding, *held*, that trial court did not abuse its discretion in denying such petition, with leave to contest the disposal of funds remaining in the receiver's hands, in view of the fact that the petitioner had known of the pending proceeding long before entry of the final decree."

In *Whittaker v. Brictson Mfg. Co.*, (8th C. C. A.) 43 Fed. (2d) 485, the court says:

(p. 489) "While intervention under some circumstances may be a matter of right, if properly presented to the court, it is generally a matter of sound legal dis-

cretion exercised in line with recognized judicial standards in the interest of justice.

(p. 490) "We quote from 11 Encyclopedia of Pleading and Practice, pp. 509, 510: 'An intervener in a suit between other parties must accept such suit as he finds it, and is bound by the record of the case at the time of his intervention. He cannot raise an issue as to whether the proceedings are regular, nor can he plead exceptions having for their object the dismissal of the action. He cannot raise new issues in the suit, nor insist upon a change in the form of the proceeding.'

(p. 491) "To seek to set aside the entire proceedings in a case and to have the same held for naught on the ground that they were absolutely void cannot be in recognition of the propriety of the main suit."

In *Board of Drainage Commissioners v. Lafayette Bank*, (4 C. C. A.) 27 Fed. (2d) 286, on page 296, the court says:

"This rule (Equity Rule 37), in plain terms, permits intervention in subordination to, and in recognition of, the propriety of the main proceedings, hence to seek to intervene with the view of challenging the jurisdiction of the court, or otherwise inaugurating litigation not within the scope and purview of the original suit, is not permissible, and should be denied." (p. 296)

"The effort to intervene was in no sense one in recognition of the propriety of the main proceedings, or intended to be subordinate thereto, but, on the contrary, was directly antagonistic to everything that was sought to be done in the main suit, and intended to contravene the same, and was filed therein after that suit had been pending more than two years." (p. 296)

3. The general rule is that a petition to intervene is addressed to the sound discretion of the court, and that an order denying intervention is not an appealable order. It is only in exceptional cases that such an order is appeal-

able. In *United States v. California Canneries*, 279 U. S. 553, on page 556, the court says that an order denying intervention is appealable only when one seeking to intervene has a direct and immediate interest in the *res* that is the subject of the suit. No argument is needed to show that these stockholders have no such an interest in the subject matter of this suit. All the relief they ever could get could have been obtained in the stockholder Hoover suit commenced in 1900 and now pending. The Hoover suit, and the activity of these stockholders in connection with it, are recited at length in the petition to intervene. (Par. 5th, R. 1044-1057). The order appealed from has not any characteristic of a final order concluding the stockholders from enforcing their alleged rights.

In *Credits Commutation Co. v. United States*, 177 U. S. 311, on pages 315-316, the court says:

> "The question was well considered by the Circuit Court of Appeals, and we quote and adopt its statement, as follows:
>
> " 'When such an action is taken, that is to say, when leave to intervene in an equity case is asked and refused, the rule, so far as we are aware, is well settled that the order thus made denying leave to intervene is not regarded as a final determination of the merits of the claim on which the intervention is based, but leaves the petitioner at full liberty to assert his rights in any other appropriate form of proceeding. Such an order not only lacks the finality which is necessary to support an appeal, but it is usually said of it that it cannot be reviewed, because it merely involves an exercise of the discretionary powers of the trial court * * *. It is doubtless true that cases may arise where the denial of a third party to intervene therein would be a practical denial of certain relief to which the intervenor is

fairly entitled, and which he can only obtain by an intervention. Cases of this sort are those where there is a fund in court undergoing administration to which a third party asserts some right which will be lost in the event that he is not allowed to intervene before the fund is dissipated.' "

Their rights are expressly saved by the order denying leave to intervene as above shown.

The above decision was followed by this court in *Rodman v. Richfield Oil Co.,* 66 Fed. (2d) 244.

In *Palmer v. Bankers' Trust Co.* (C. C. A. 8th), 12 Fed. (2d) 747, on page 752, the court says:

"In each case the court is called upon to exercise its sound legal judgment. In some cases the facts and circumstances may be such that to deny the intervention would be error on the part of the chancellor; for example, where the petitioner, not being already fairly represented in the litigation, is asserting a right which would be lost or substantially affected if it could not be asserted at that time and in that form. In such cases the right of intervention is often termed absolute. (Citing cases.) In other cases, the facts and circumstances may be such that the court is clearly justified in denying intervention. The mere matter of delay alone is often a decisive factor with the court. *First Nat. Bank v. Shedd,* 121 U. S. 74, 86, 7 S. Ct. 807, 30 L. Ed. 877."

In *Lewis v. Baltimore & L. R. Co.* (C. C. A. 4th), 62 Fed. 218, on pages 221, 222, the court says:

"No right of the petitioner has been finally adjudicated by any of the orders of the court. Besides, this refusal of the circuit court to admit Street as a party is not an appealable order. It is in no sense a final judgment. It concludes no right. In the language of

> Waite, C. J., in Ex Parte Cutting, 94 U. S. 22: 'No appeal lies from the order refusing them leave to intervene to become parties. That was a motion in the cause, and not an independent suit in equity, appealable here.' Were the courts of last resort to entertain appeals to make a person a party, causes would be constantly going up piecemeal, great confusion would be created, and insufferable delays caused."

4. The petitioners were guilty of inexcusable laches. The first attempt to come into the suit was by filing on September 3, 1937, the pretended answer and cross-bill without asking leave of the court. The suit was commenced July 31, 1930. The Special Master was appointed February 25, 1932, and defenses on points of law and motions in the nature of demurrers were referred to him in the order of reference. The Master filed his first report May 31, 1933, in which he ruled upon the 1875 reorganization and the 1896 foreclosure proceedings. Said report, as already stated, was adopted by the Court and all exceptions thereto overruled by order of October 3, 1935. Lengthy hearings for taking of evidence were held, beginning in April, 1936, and the Master's second report was filed July 26, 1937. These stockholders delayed more than seven years after the commencement of the suit and more than four years after the filing of the Master's first report before they filed the alleged answer and cross-bill. The petition for leave to intervene was not filed until January 31, 1938. This unexplained delay amounts to such laches as justified the District Court in denying leave to intervene.

In *Levy v. Equitable Trust Co.* (C. C. A. 8th) 271 Fed. 49, some individual stockholders of the Denver & Rio Grande R. R. Co. unsuccessfully sought to intervene in the

suit pending in the trial court, in which a decree had been entered for the sale of the equity of the Denver Company in its railroad properties. The court says, on page 55:

"After all the above had occurred with such publicity as usually attends important matters of that kind, the petitioning stockholders asked the court below to stay further proceedings to enable them to investigate and assert a defense of fraud to the New York judgment not made by their corporation; and the essential elements of the fraud they assert consist of matters of long standing, not secret or concealed at the time, but of public notoriety or report, part in recitals in the records of their railroad company kept as required by law, of which they were bound to take notice, and part of known corporate history shown in financial and statistical publications in current and common use. The very corporate structure of the consolidated Denver, in which the petitioners hold their stock, discloses (1908) an express assumption of the obligations of contract B which they now assail. They knew or should have known that the litigation in California and New York against the Western Pacific (1915-1916) might affect seriously their interests in the Denver. But, whether so or not, the suit of the Trust Company against the Denver in the Southern district of New York (1915-1917) was at once a warning of what might follow. The Trust Company sought in that suit the subjection of the property of the Denver to its liability under contract B and so stated in its initial pleading. *The case was pending in that court for two years before final judgment was rendered, and the Denver corporation was allowed to defend it without action or participation upon the record by the stockholders.*

"These and many other proceedings and transactions within the five years prior to their petition to intervene, of which they knew or could have known, and therefore must in law have known, constitute an obstacle to the

relief now sought which the court below had no power to remove. Leavenworth Commissioners v. Railway, 134 U. S. 688, 10 Sup. Ct. 708, 33 L. Ed. 1064; Foster v. Railroad, 146 U. S. 88, 13 Sup. Ct. 28, 36 L. Ed. 899." (Italics supplied).

In *Young v. Southern Pacific Co.* (C. C. A. 2nd), 34 Fed. (2d) 135, the court below dismissed the complaint because of inexcusable laches appearing on the face of the complaint. On page 137 the court says:

"By an amendment to the bill, it is alleged that others were allowed to intervene in the Bogert Case. This is no excuse for the long delay and appellants' inactivity. In the Bogert Case, the bill alleged sufficient details of the activity of the plaintiffs there to excuse the long delay. Nothing in this bill suggests appellants' connection with the Bogert Case, except the unsuccessful attempt to intervene. This prior litigation does not excuse the delay of the appellants, for they were not parties. Cressey v. Meyer, 138 U. S. 525, 11 S. Ct. 387, 34 L. Ed. 1018. During this long period, the bill alleges, the stock increased to great value. The reorganization agreement, attacked by the bill of complaint, shows that unsecured debt creditors were offered stock in the new company for their indebtedness, if they paid the expenses of the reorganization. None accepted this offer. The reorganization expenses amounted to $26 per share. In the Bogert Case the final decree, made pursuant to the Supreme Court's mandate, required $60 per share in order to acquire the new stock. Creditors to whom this offer was made apparently regarded the stock then as of little value.

"The change in the value of the stock, under the circumstances here disclosed, no longer entitles the appellants to the aid of a court of equity. Wetzel v. Minnesota Ry. Transp. Co., 169 U. S. 237, 18 S. Ct. 307, 42 L. Ed. 730; Abraham v. Ordway, 158 U. S. 416, 420, 15

S. Ct. 894, 39 L. Ed. 1036. If the interveners, who were denied intervention in the Bogert Case, were guilty of laches, there is more reason to successfully charge laches against the present appellants. It was more than 2½ years later that the appellants began this suit. They might have had the relief given to the Bogert stockholders, if they had been active. The appellee purchased all the new stock under the reorganization agreement, including that owned by the Bogert plaintiffs. It was after that purchase that the present appellants commenced this suit."

These appellees respectfully submit that if the motion to dismiss is denied, the order of the District Court should be affirmed.

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D. R. FROST,
F. J. McKEVITT,
Solicitors for Appellees,
Northern Pacific Railway Company,
Northern Pacific Railroad Company,
Northwestern Improvement Company.

WHITE & CASE,
Solicitors for Appellee,
Bankers Trust Company.

MITCHELL, TAYLOR, CAPRON & MARSH,
Solicitors for Appellee,
City Bank Farmers Trust Company.

No. 8893

In the United States Circuit Court of Appeals

For the Ninth Circuit

CHARLES E. SCHMIDT, ET AL., MINORITY STOCKHOLDERS OF THE NORTHERN PACIFIC RAILROAD COMPANY, INTERVENING PETITIONERS,

Appellants

v.

UNITED STATES OF AMERICA, NORTHERN PACIFIC RAILWAY COMPANY, ET AL.,

Appellees

BRIEF OF APPELLEE UNITED STATES AND MOTION TO DISMISS APPEAL

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Washington, D. C.,
Special Assistants to the Attorney General.

MISSOULIAN

INDEX

Cases:

INTRODUCTORY STATEMENT

It is the position of the United States (1) that the order appealed from is not an appealable order, and hence that the appeal should be dismissed, and (2) that the appeal is without merit.

Because appellee's motion to dismiss the appeal is sustained by substantially the same points and authorities as those contained in the argument on the merits, the motion for dismissal of the appeal is included under the same cover as the brief for appellee, in order that unnecessary repetition may be avoided.

IN THE UNITED STATES CIRCUIT
COURT OF APPEALS
FOR THE NINTH DISTRICT
NO. 8893

CHARLES E. SCHMIDT, et al., MINORITY STOCKHOLDERS OF THE NORTHERN PACIFIC RAILROAD COMPANY, INTERVENING PETITIONERS,
Appellants

v.

UNITED STATES OF AMERICA, NORTHERN PACIFIC RAILWAY COMPANY, ET AL.,
Appellees

MOTION TO DISMISS APPEAL

Comes now the United States of America, one of the appellees herein, by its counsel, and respectfully moves the Court to dismiss with costs the appeal taken herein by Charles E. Schmidt, Joseph Landell, Executor of E. A. Landell, deceased, Clarence Loebenthal, Trustee of Bernard Loebenthal, and Walter L. Haehnlen, upon the ground and for the reason that the order of the District Court denying appellants' motion for leave to intervene, from which an appeal has been allowed, is not an appealable order.

WALTER L. POPE,
E. E. DANLY,
Special Assistants to the Attorney General.
Attorneys for United States of America,
Appellee.

POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS THE APPEAL

The order from which an appeal has been allowed is not an appealable order.

As pointed out in *United States* v. *California Canneries,* 279 U. S. 553, 556, an order denying leave to intervene is not appealable, except in a few exceptional cases. The reason for the rule is, that ordinarily the granting or denial of leave to intervene is within the discretion of the trial court and hence the court's order is not final.

It is therefore obvious that the argument which will be made by the appellee upon the merits of the appeal in support of its contention that there was no error in denying leave to intervene, will also support appellee's argument that the order from which an appeal was allowed is not a final or appealable order. The points and authorities contained in appellee's summary of argument, contained in the brief proper, p. 22, *infra,* are the points and authorities relied upon in support of appellee's contention that the order here involved comes within the general rule stated in the *California Canneries Case* and not within any of the exceptions thereto. Reference is therefore made to such points and authorities.

STATEMENT OF THE CASE

The so-called "Statement of the Case" contained in appellants' brief, filled as it is with extracts from correspondence, scraps of evidentiary material without support in the record, legal arguments, unsupported assertions of counsel and miscellaneous anecdotes, is almost impossible to understand. No attempt will be made to point out its numerous errors. Whether the nomination of William Jennings Bryan in 1896 was one cause of the 1896 reorganization of the Northern Pacific (Br. 34); whether Mr. Johnson and Judge McCullen were "too good attorneys to permit their rights to be lost by laches" (Br. 40); what Mr. Stetson said in a letter in 1908, or in a brief in the Northern Securities Case (Br. 31); whether Mr. Earl in 1903 said that these stockholders should have been settled with long ago (Br. 35); or whether there were many negotiations for settlement of the Hoover suit (Br. 39) are matters with which this court is not concerned. Such a statement would appear to be of little assistance to the court, and for that reason appellee must state the case.

This is an appeal from that portion of an order of the District Court dated March 9, 1938 denying appellants leave to intervene and to file an intervening petition (R. 1187-1188, 1190).[1]

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[1]The order allowing the appeal was made by Judge Wilbur July 5, 1938 (R. 1271). This order was made upon a typewritten petition presented to Judge Wilbur. Copy of this petition is not printed in the record. Printed in the record on page 1246 is an earlier petition dated May 24, 1938 which was presented to Judge Webster and by him denied. It will be noted that the petition printed in the record did not list as an order sought to be appealed from that part of the order of March 9, 1938 denying leave to intervene. As pointed out at the time

The suit in which intervention was sought and denied was filed by the Attorney General July 31, 1930, against the Northern Pacific Railroad Company, the Northern Pacific Railway Company and the Northwestern Improvement Company, one of its subsidiaries, and the trustees under outstanding mortgages. The suit was brought pursuant to the Act of June 25, 1929, 46 Stat. 41, the full text of which is quoted in the Appendix, *infra*.

The Act of June 25, 1929.

The history of the Act referred to is as follows: The Act of July 2, 1864, 13 Stat. 365, and the joint resolution of May 31, 1870, 16 Stat. 378, made certain grants of public land to the Northern Pacific Railroad Company in aid of the construction of a railroad from Lake Superior to Puget Sound. After the railroad had been constructed, withdrawals of lands within the indemnity limits of the grant, principally for national forests, gave rise to a controversy between the United States and the

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the order allowing the appeal was sought from Judge Wilbur, the first time the denial of leave to intervene was specified as an order from which appeal was sought, was in the typewritten petition which was presented to Judge Wilbur and omitted from the printed record. This petition sought allowance of appeals from other portions of the order of March 9, 1938, and from numerous other orders made over a long period of time, ranging from May 24, 1932 to March 22, 1938, all of which attempted appeals were disallowed. Most of the assignments of error sought to be argued in appellants' brief relate to the orders from which appeal was denied. Only one of the assignments which accompanied the petition for appeal is printed in the record. That is the one relating to denial of intervention (R. 1248). The numerous assignments filed March 22, 1938, (R. 1217-1235), were not filed in connection with this appeal, but accompanied a petition for an appeal to the Supreme Court, which was denied. See *Northern Pacific R. R. by Charles E. Schmidt v. United States,* 58 Sup. Ct. 1036, (May 16, 1938).

railway company, successor to the railroad company, concerning the right of the United States to make such withdrawals, and in a case begun about 1915, known as the *Forest Reserve Case,* the United States sought to cancel the patent to certain lands so withdrawn for a national forest.

The decision of the Supreme Court in that case *(United States* v. *Northern Pac. Ry.,* 256 U. S. 51) after stating (pp. 58-60) the terms and history of the grants, held that

> * * * it was not admissible for the Government to reserve or appropriate to its own uses lands in the indemnity limits required to supply losses in the place limits. * * * if it could take part of the lands required for that purpose, it could take all and thereby wholly defeat the provision for indemnity. (pp. 66-67).

The case was therefore remanded to afford the parties an opportunity to show whether there remained, after the withdrawals, sufficient public lands to satisfy all of the losses in the primary limits.

The Department of the Interior thereupon began to adjust the grant upon the basis of the court's decision. A tentative adjustment prepared by the Commissioner of the General Land Office was transmitted to the Forester, Department of Agriculture, as well as to the railway company.

The Forester, commenting upon the tentative adjustment, specified 22 items or particulars in which he claimed there had been errors in the administration of the grant, breaches of its terms or conditions or fraud in its performance, and suggested an investigation by Congress. (Joint Committee on Northern Pacific Land

Grants, Hearings, vol. I pp. 9, 26, 27). President Coolidge then called the matter to the attention of Congress, and upon his recommendation a joint resolution was enacted (43 Stat. 461) suspending the adjustment and forbidding the issuance of further patents until a Congressional investigation could be had.

Hearings Before Joint Congressional Committee.

A joint committee was appointed pursuant to the resolution, and it proceeded to hold extensive hearings, which are recorded in a report containing some 5500 printed pages. The hearings followed in general the 22 suggestions made by the Forester. The attorney for the Forest Service presented the case for the Government, and upon the conclusion of the hearings the Attorney General was required by a further joint resolution (44 Stat. 1405) to advise the committee as to what legal or legislative action should in his judgment be taken. He made an analysis of the record of the hearings and made specific recommendations as to each of the twenty-two suggestions of the Forester. As a result of the hearings, the committee reported a bill which became the Act of June 25, 1929.

In the *Forest Reserve Case,* 256 U. S. 51, the Supreme Court said (at p. 58) that "the rights and obligations of the original railroad company * * * have long since passed to the present railway company and there is no need here for distinguishing one company from the other." Among the Forester's 22 items or suggestions, numbers 18 and 19 charged that the conduct of the railroad company and of the railway company in respect to proceedings taken to foreclose certain mortgages were

in violation of provisions of the joint resolution of May 31, 1870 relating to the disposition and sale of lands within the grant. The committee reported (Cong. Rec., 70th Cong., 2nd Sess., pp. 5121-5122; H. Rep. No. 9190, 71st Cong., 1st Sess., No. 2) that such proceedings constituted a breach of the covenants of the grant rendering it subject to forfeiture. But neither in the course of the hearings nor in the committee report was there any suggestion by the Forester, by the Attorney General or by the committee that any occasion existed for questioning the statement of the Supreme Court that the railway company did in fact succeed to the rights and obligations of the railroad. The inquiry as to the mortgages and the foreclosure proceedings related solely to whether they constituted a breach of covenant by the grantee.

The Act of June 25, 1929, 46 Stat. 41, which resulted from these hearings, provided as follows:

1. * * * all lands within the indemnity limits . . . which, on June 5, 1924, were embraced within . . . any national forest . . . and which, in the event of a deficiency . . . would be, or were, available to the Northern Pacific Railroad Company *or its successor, the Northern Pacific Railway Company,* by indemnity selection . . . are hereby retained by the United States. . . Provided, That for . . . the aforesaid indemnity lands hereby retained . . . the Northern Pacific Railroad Company or its successor, the Northern Pacific Railway Company, . . . shall receive compensation from the United States to the extent if any, . . . the courts hold that compensation is due. (Sec. 1). [Italics supplied].
2. * * * all of the unsatisfied indemnity selection rights . . . are hereby declared forfeited to the United States. (Sec. 2).
3. The Attorney General is hereby authorized

> and directed forthwith to institute and prosecute such suit or suits, as may, in his judgment, be required to remove the cloud cast upon the title to lands belonging to the United States as a result of the claim of said companies, and to have all said controversies and disputes respecting the operation and effect of said grants, and actions taken under them, judicially determined, * * * (Sec. 5).

4. Section 5 recited that in such judicial proceedings there should be (a) a full accounting between the United States and said companies, (b) a determination as to whether either of said companies was entitled to any of the unpatented lands within indemnity limits, (c) a determination as to what extent the terms, conditions, and covenants of the grants have been performed, "including the legal effect of the foreclosure of any and all mortgages . . . and the extent to which said proceedings and foreclosures meet the requirements of said resolution with respect to the disposition of said granted lands," (d) a determination as to what lands have been erroneously patented as the result of fraud, mistake or misapprehension as to the proper construction of said grants, and (e) a determination of "all questions of law and fact, and all other claims and matters which may be germane to a full and complete adjudication of the respective rights of the United States and said companies."

The Act repeatedly alludes to the railway company as the successor of the railroad company. It contains no provision for a determination of the truth of this recital.

In brief, the Act of 1929, 46 Stat. 41, simply provided (a) that if the grantee is entitled to any further lands,

the United States would pay for them rather than convey the lands to the grantee, and (b) that it should be determined by court action whether the grantee was entitled to further lands, and, if so, the compensation to be paid therefor.

Suit Filed in 1930. First Phase.

This suit was filed in the United States District Court for the Eastern District of Washington and took the form of a bill to quiet title in the United States to approximately 2,900,000 acres of withdrawn land in the claimed indemnity limits. The bill of complaint (R. 1-147) contained (a) numerous charges of violation of the provisions of the granting acts, (b) allegations of fraud in the performance of the acts, and (c) allegations of errors in their administration.[2]

Among the charges of breach of such provisions were allegations that the acquisition of the rights of the Northern Pacific Railroad Company under the grant by the

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[2]Paragraphs I to V (R. 1-13) contain preliminary and general allegations. Paragraphs VI to XIX and paragraph XXXI (R. 13-65, 125-128) contain allegations of sundry violations of the grant. Paragraphs XX to XXVII and XXXII to XXXVII (R. 65-106, 128-138) contain allegations as to numerous mistakes and errors in the administration of the grant. Paragraph XXVIII (R. 106-117) contains allegations of fraud on the part of the defendant railway company in connection with the mineral classification of lands under the Act of February 26, 1895, 28 Stat. 683. Paragraph XXIX (R. 117-124) contains allegations with respect to the so-called "Indian Point," including the allegation that large quantities of lands were erroneously patented to the railroad company to which the company was not entitled because the lands had been reserved for various Indian tribes. Paragraph XXXVIII (R. 138) alleges the statutory forfeiture under the Act of June 25, 1929. The remainder of the paragraphs (R. 139-142) contain allegations relating generally to claims for discovery and accounting.

Northern Pacific Railway Company through foreclosure of certain mortgages, pursuant to a plan of reorganization of the Northern Pacific Railroad Company of March 16, 1896, was "in evasion of and in defiance of the provisions of the said joint resolution of May 31, 1870" (R. 63; paragraphs XVI to XIX, R. 47 to 65).

Briefly the burden of this portion of the bill is the same charge as that made by the Forester before the joint committee. It is, not that the railway company did not succeed to the railroad company's interest in the land grant, but rather, that it did acquire the lands in defeat of the public policy,[3] and this is the thing complained of. With reference to the 1896 plan or reorganization, it is alleged that it was collusive and fraudulent against the United States in that it was the intent and purpose to acquire for the successor company thirty-five million acres of the lands contained in the land grant "in evasion of and in defiance of the provisions of the joint resolution of May 31, 1870," which required that the lands on foreclosure "would be sold under bona fide sales to third persons at public sale, at places within the States and Territories in which they shall be situate" (R. 62-63).

Thus the bill alleges that the railway company received and acquired lands which it mortgaged and other-

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[3]" * * * as a consequence of which said foreclosures and other proceedings collateral thereto, the Northern Pacific Railway Company, a Wisconsin corporation, one of the defendants named in this action, succeeded to by operation of law or otherwise, whatever rights, titles, interests and obligations either in law or in equity that were then held under and by virtue of the said Act of July 2, 1864 . . . by the said Northern Pacific Railroad Company" (R. 35-36).

wise dealt with, but which Congress intended should be sold to third persons, with the result that the railway company received

> Values in excess of the prices the lands would have brought had they been sold to third persons under bona fide sales upon the foreclosure of the said mortgages, all of which was in violation of the provisions of the said Act . . . and Joint Resolution (R. 64).

The prayer of the complaint was (1) that the court quiet title in the United States to all of the withdrawn lands involved in the suit and decree that the defendants are entitled to no compensation (R. 142-144); (2) that the court decree that the unsatisfied indemnity selection rights if any exist are now forfeited by the Act of June 25, 1929 (R. 144); (3) "that the court determine the extent to which the Northern Pacific Railway Company and/or its predecessors in interest have failed to comply with the covenants in the Joint Resolution . . . and pertaining to (a) the disposition of the granted lands by settlement and preemption five years after the completion of the entire railroad and (b) pertaining to the public sale of the granted land upon the foreclosure of any mortgage . . .; that this court decree that any and all moneys received . . . from or by reason of the said granted lands, after breaches of either one or both of the said covenants, be declared to have been received in trust . . . and that the plaintiff be awarded judgment against the Northern Pacific Railway Company for such portions of said moneys, or their equivalent as this court may find the plaintiff entitled to receive" (R. 144-145); (4) for an adjustment and accounting of the grant (R. 146); (5)

for an injunction, discovery, and general relief (R. 147).

A voluntary appearance was entered by all defendants (R. 225). The railway company filed an answer which contained a general motion to dismiss and which pleaded the defenses of equitable estoppel, res adjudicata, laches, statute of limitations, and other defenses (R. 244-416). The railroad company first filed a disclaimer (R. 417) of any interest in the subject-matter of the suit, which was later stricken on motion of the Government (R. 418), and the railroad company filed an answer in which, *inter alia,* it adopted by reference the answer of the railway company (R. 420-421).

On February 25, 1932, the trial court appointed Frank H. Graves as Special Master, and under Equity Rule 29 the special defenses raised by the pleadings were called up for hearing prior to trial on the merits. Upon motion of the railroad company the defenses raised in its answer were also referred to the Master on May 24, 1932 (R. 423). After a hearing on the issues thus raised extending over a period of more than a month, the Master on May 31, 1933 filed his report which was generally favorable to the defendants (R. 425-662). With respect to the allegations of the bill relating to the 1896 foreclosure, the Master held that the facts alleged disclosed no breach or violation of the terms of the joint resolution and that the demurrer to this subdivision of the bill should be sustained (R. 643-646). He further pointed out that it was not sought by the Government to set aside the sales (R. 645) and that in any event the Government would be estopped to do so by reason of its many years of dealing with the railway company as successor to the railroad company (R. 648). Exceptions which had been filed and

argued by the parties on both sides, were overruled, and by its order of October 3, 1935, the court adopted the report of the Master "in its entirety" (R. 680).

Second Phase.

Thereafter, on April 21, 1936, the case was referred back to the Master (R. 684), with directions to determine the lands, if any, for which the plaintiff or defendants are entitled to receive compensation, leaving for later determination the amount of such compensation.

After a hearing which lasted for more than ten months, and on July 26, 1937, the Master filed his second report (R. 686), finding that the railway was entitled to compensation for approximately 2,500,000 acres. Again exceptions were filed to the report by the parties on both sides within twenty days after it was made, as required by Equity Rule 66 (R. 887, 893). On March 22, 1938, Judge Webster, after hearing argument upon the exceptions, made an order (R. 1211) sustaining some exceptions, overruling others, and reserving ruling on others pending further consideration, and directing the submission by the parties of proposed findings. By such ruling, the area of withdrawn land for which compensation should be paid by the plaintiff was reduced to approximately 1,400,000 acres.

Some Issues Remain Undetermined.

Third Phase.

It will be noted that the report of the Master just referred to did not pass upon the amount of compensation, which remains undetermined. It was believed that it would be to the advantage of all parties to have a decision of the Supreme Court finally determine the lands

for which compensation must be paid, before the introduction of evidence should begin upon the third phase of the case, which might be called the valuation phase, since the appraisal of such a vast acreage is obviously an expensive undertaking. Accordingly, the Act of May 22, 1936, 49 Stat. 1369, authorizing a direct appeal to the Supreme Court from the orders entered in the first and second phases of the case, was passed, copy of which is set forth in the Appendix, *infra.*

Appellants' Attempted Intervention.

It was not until after the Master's second report had been filed and more than seven years after the filing of the Bill of Complaint that the appellants filed any pleadings in this cause. Even then, they made no application for leave to intervene until six months later. On August 25, 1937 and after the time for filing exceptions had expired, they filed a motion to extend for thirty days the time "within which the said Northern Pacific Railroad Company may file exceptions to the report of Commissioner Frank H. Graves."[4] Thereafter and also without first having obtained leave of court, the appellants filed the following papers:

1. September 3, 1937, appellants filed an answer and cross-bill (R. 952) entitled "Northern Pacific Railroad Company by Charles E. Schmidt and other Minority Stockholders," alleging that the railroad company was being held "in captivity" by the railway company, and asking the court to determine a variety of issues with respect to the legality of the corporate organiza-

[4]Of course the Northern Pacific Railroad Company through its own attorneys had regularly filed exceptions within the time allowed by the Equity Rules. (R. 887, 891).

tion of the railway company and the ownership not only of the lands in suit but of all property held by the railway company.

2. On February 19, 1938, appellants filed a motion "to construe, modify, and/or amend" the report of the Master (R. 1182), which in effect asked the court to determine which of the two companies was the owner of the property involved in and covered by the report.

3. On February 19, 1938, appellants filed purported exceptions to the Master's report (R. 1185), in which they "make and adopt each and all of the exceptions to said report heretofore filed in this cause on behalf of the Northern Pacific Railway Company and the Northern Pacific Railroad Company."

The motion and petition for leave to intervene were filed by appellants January 31, 1938. The allegations of the petition (R. 1037) are similar to those made in the answer and cross-bill, to which it refers. It alleges (R. 1040-1041):

> One of the principal bases of this petition is to restore to the said railroad company all its rights, privileges, franchises, properties, money and assets, free and clear of all encumbrances, interference or management of and by the said Northern Pacific Railway Company, hereinafter called the railway company, and to release the said railroad company from the captivities which it has been put into and held under by the wrongful and unlawful acts of the said railway company and the officers and officials of the said railway company and the said railroad company as hereinafter set out and to declare, decree and enforce all the rights of the said railroad company and of these minority stockholders and all others in a similar position and of all of the said defendants and of all other persons interested * * *.

It is alleged in the petition[5] that ever since the reorganization of 1896 these appellants, non-consenting stockholders of the railroad company, have endeavored to obtain relief from that company (R. 1043), but without success because the railway company, through control of the railroad company's stock, keeps the latter "in captivity" (R. 1020).

The burden of the petition is that no title or other right ever passed to the railway company, and that such company is not the successor of the railroad company. The allegations in the petition and in the answer and cross-bill to which reference is made, are to the effect that:

1. The Northern Pacific Railway Company was never legally organized because a majority of the incorporators did not attend a certain meeting (R. 998).
2. That the railway company was prohibited by

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[5]To extract any meaning from the petition is well-nigh impossible. It is so multifarious, prolix and unintelligible as to defy understanding. The matters here stated have been laboriously winnowed from a mass of disjointed quotations from letters, newspaper stories, court opinions, legal arguments and miscellaneous anecdotes, such as private correspondence between attorneys in the Hoover suit (R. 1052-1057), what Josiah Perham once said (R. 1057), what was averred in other suits (R. 1058, 1106, 1107), what F. L. Stetson said while speaking, while testifying, and in letters (R. 1066, 1101, 1104), the entire contents of a resolution introduced in Congress but never voted on (R. 1085), legal arguments (R. 1097, 1116, 1153), court opinions (R. 1099, 1117, 1119, 1121, 1130, 1149, 1164, 1172), what Hiram Hayes said in affidavits, testimony, and letters (R. 1109, 1111, 1113, 1139), what the "Superior Times" of Saturday, September 4, 1880, had to say (R. 1133), and what is said in a book on Corporate Financing (R. 1171). The petition must be read in full to be appreciated.

Wisconsin law from buying the railroad,[6] and that certain later validating statutes of Wisconsin were contrary to the Wisconsin constitution (R. 1129-1131, 997-1007).

3. That the railway company had been consolidated with the railroad company and ceased to exist as an independent entity in that the railroad company since before 1880 owned 3800 shares of the stock of the railway company (R. 1108, 1109, 1111, 1113, 1132, 1142) and also built a road for the railway company (R. 1138-1141, 1143), "and adopted such road as part of its own main line and from that time the [railway company] ceased to keep up any separate corporate existence" (R. 1133).[7]
4. That certain mortgages executed by the railroad company between 1879 and 1889, and later foreclosed, were unauthorized and ineffective (R. 993-994, 980).
5. That the decree of foreclosure of these mortgages, made pursuant to the 1896 plan for reorganization of the Northern Pacific (R. 1058-1084), was null and void since the court was

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[6]Evidently because of lack of statutory authority to own lands (R. 1124) and because of a statutory prohibition of purchase where a parallel line existed (R. 1129).

[7]The consolidation is alleged in the following language, which is typical of the entire petition: "The decision in Williams vs. Southern New Jersey R. R. Co., 26 N. J. Equity, 398, is ample authority that the conduct of the parties here was sufficient to work a consolidation even though no formal agreement of consolidation was recorded with the State authorities" (R. 1135).

without jurisdiction, (R. 1147) and the proceedings were by consent and collusive (R. 1153).

6. That the sales under this and other supplementary decrees were in violation of the joint resolution of May 31, 1870, in that the lands were not sold upon the notice or at the places required by law (R. 1151, 1161).
7. That the deed made by the railroad company to the railway company pursuant to the provisions of the decrees of the court and resolution of the board of directors was invalid in that the property sought to be conveyed was not transferable (R. 1011-1013).

The prayer is that they be permitted to file the petition, that the court find that the 1896 reorganization and foreclosure, were null and void (R. 1172-1173) and that no title ever passed out of the railroad company, but that title to all granted lands is still in such company (R. 1025-1026),[8] that the railroad company "be released from the captivity thereof by the said railway company," and in the alternative, that appellants have a money judgment against the railway company for the

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[8]The cross-bill alleges (R. 1019):

> That these minority stockholders and others similarly situated are entitled to their pro rata interest in all the properties, lands, land grants, leases, notes, bonds, stock, monies and all other assets of the Northern Pacific Railroad Company owned and possessed by the Northern Pacific Railroad Company in 1875 and in 1896 and all of same which have been seized, grabbed, collected, taken possession of and held by the said so-called railway company from 1896 to this date, whether or not held by the said so-called railway company in its own name or whether put into the names of other corporations and individuals for its benefit * * * .

par value of their stock plus dividends declared (R. 1173, 1174).

There is no allegation that the railway company and the railroad company are not adequately presenting all possible claims against the United States.

The motion for leave to intervene and to file the petition in intervention was denied by the court March 9, 1938 (R. 1187). This appeal from the order denying such leave was allowed July 5, 1938 (R. 1271).

After the petition for leave to intervene had been denied the appellants filed a series of motions[9] which are recited in many of the assignments of error here urged. As they relate to matters and things done subsequent to the ruling now appealed from, none of them have any bearing here.

It should, however, be noted that on March 22, 1938, and during the same term, the court, in denying a so-called "motion to re-hear" matters previously disposed of, recited in the order (R. 1209, 1210):

> It is further ordered, that this Order shall be with-

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[9]On March 11, 1938 appellants filed a petition and motion "to review, revise, and amend decree or order entered in this cause on March 9, 1938" (R. 1192), containing an interesting and sprightly account taken from the Spokane Spokesman-Review of March 9, 1938 describing how Judge Webster surprised his listeners. A like motion was made by "Northern Pacific Railroad Company by Charles E. Schmidt and other minority stockholders" (R. 1190), and on March 16, 1938 the same parties filed a motion to dismiss the original and amended bill of complaint. (R. 1207). On August 29, 1938 and after this appeal had been allowed, appellants filed a motion to strike certain stipulations of the parties which had been approved by the Court August 1, 1938, (R. 1258), and on September 3, 1938 appellants filed a so-called "answer and cross-bill of the Northern Pacific Railroad Company by Schmidt and other minority stockholders to the amendment to the amended bill of plaintiff filed August 1, 1938.".

out prejudice to the right of said Charles E. Schmidt, George Landell, executor of E. A. Landell, deceased, Clarence Lobenthal, trustee of Bernard Lobenthal, and Walter L. Haehnlen, themselves or as representatives of other stockholders of said Northern Pacific Railroad Company, or of such other stockholders themselves to assert later in this cause, when the fund, if any, to be distributed by the United States, is established and fixed or in any other proceeding, any rights which they may have by reason of the matters and things alleged in said answer and cross-bill and in said intervening petition.

SUMMARY OF ARGUMENT

I. Appellants had no absolute right to intervene. At the very most their intervention was within the court's discretion. If so, the order denying intervention was not appealable because not final. The argument upon this point demonstrates both (1) that the appeal should be dismissed, and (2) that the appeal is without merit.

A. The Act of June 25, 1929, under which this suit is brought does not confer upon appellants a right to intervene. On the contrary it clearly contemplates that no such issue as that tendered by appellants shall be tried.

(1) The Act repeatedly refers to the railway company as the "successor" of the railroad company. Act of June 25, 1929, 46 Stat. 41, secs. 1, 2, 4, and 6.

(2) While Section 5 of the Act authorizes findings relating to certain "proceedings and foreclosure," such findings are limited to their bearing upon the question of performance of the provisions of the granting acts. There is no provision in the Act of 1929 authorizing the court to determine whether the railway company is the successor of the railroad company.

(3) The history of the Act discloses that it was never contemplated that the issues now tendered by appellants should be tried,—rather that Congress accepted as final the statement of the Supreme Court in the *Forest Reserve Case,* 256 U. S. 51, 58, that the rights of the railroad company had passed to the railway company.

Hearings before Joint Committee, pp. 4333, 5093, 5247, 5311, 5504.

Cong. Rec., 70th Cong., 2d Sess., p. 5118.

United States v. Northern Pac. Ry., 256 U. S. 51, 58.

B. There is as yet no fund in court. Indeed, after the Supreme Court has heard the appeal authorized by the Act of May 22, 1936, its decision may be that there never will be any fund. Until that appeal is disposed of, any attempted intervention to claim a fund would be premature.[10] Judge Webster's Order of March 22, 1938 (R. 1209, 1210), carefully reserved to appellants any rights they might have "when the fund, if any . . . is established and fixed."

Act of May 22, 1936, 49 Stat. 1369.

(1) Ordinarily denial of leave to intervene is not appealable but is within the discretion of the court.

United States v. *California Canneries*, 279 U. S. 553.

Exparte *Cutting*, 94 U. S. 14.

Credits Commutation Co. v. *United States*, 177 U. S. 311.

(2) And while an exception to the general rule may apply where there is a fund or property in court, this is applicable only when the would-be intervener has a *direct* and *immediate* interest in a *res*.

United States v. *California Canneries*, 279 U. S. 553.

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[10]As is pointed out in the argument p. 37, *infra*, appellant's claim is based upon grounds other than an alleged interest in a fund likely to be dissipated.

Credits Commutation Co. v. *United States,* 177 U. S. 311.

(3) And where, as here, the fund may never come into existence, it is within the court's discretion to deny intervention, for as yet there is no fund.

Aiken v. *Cornell,* 90 F. (2d) 567, (C. C. A. 5).

(4) And this is particularly true where the court, as here, denies intervention "without prejudice."

See *King* v. *Barr,* 262 Fed 56, (C. C. A. 9), *cert. denied,* 253 U. S. 484.

C. A careful examination of the proposed petition fails to disclose any sufficient claim by petitioners that the claim against the United States, for lands or compensation, is not being adequately presented.

O'Connell v. *Pacific Gas & Electric Co.,* 19 F. (2d) 460, (C. C. A. 9).

See *New York City* v. *New York Tel. Co.,* 261 U. S. 312, 316;

Difani v. *Riverside County Oil Co.,* 201 Cal. 210, 215; 256 Pac. 210, 212.

D. Under the rule stated in *Washington* v. *United States,* 87 F. (2d) 421, 434, (C. C. A. 9), that an order denying leave to intervene is not a "final order" if there is some other appropriate remedy available to intervener, it is clear that appellants have no right to intervene here, for there is nothing to prevent their bringing an independent stockholders' bill, such as was done in the Hoover suit. (R. 1044, 1052.)

(1) There is not a single authority to support an assertion that the United States would be a necessary or indispensable party to such a suit. The United States would have no interest in the *object* of such a suit. Its interest in the land grant is not

such as to make it either an indispensable or a necessary party.

Story, Equity Pleadings, (9th ed.), secs. 72, 230.

(2) Many suits relating to the ownership of lands within this grant, have proceeded without a suggestion that the United States was a necessary party.

II. The court was fully justified in disallowing the intervention by reason of the fact that it would unduly complicate and vex the issues to be tried by bringing into the suit a controversy solely between interveners and the defendants—a field of litigation not in issue between or open to the original parties.

Chandler Co. v. *Brandtjen Inc.,* 296 U. S. 53, 57-58.

Aiken v. *Cornell,* 90 F. (2d), 567, 568, (C. C. A. 5).

(a) The bill of complaint alleges that the railway company is the successor to the railroad company (R. 35). This was in accord with the mandate of the Act of June 25, 1929, as herein stated. That no issue on this point was tendered was repeatedly pointed out by the Master (R. 641).

(b) The issue tendered by the petition in intervention relates to property and rights wholly foreign to this suit. This suit relates solely to the land grant. Appellants' claim covers as well all assets of the railway company (R. 1040-1041, 1172, 1026).

III. The application to intervene was not timely, and was for that reason properly denied.

Merriam v. *Bryan,* 36 F. (2d) 578, (C. C. A. 9).

King v. *Barr,* 262 Fed. 56, (C. C. A. 9).

(a) By their own showing petitioners have known

of their present claims since 1896 (R. 1043). They have known of the Hoover suit since 1900 (R. 1044) and they have known of this suit since its institution on July 31, 1930. The bill as filed disclosed that no issue was made as to whether the railway company was the successor of the railroad company (R. 35).

(b) The motion for leave to intervene came exactly seven years and six months later, on January 31, 1938 (R. 1036). Such delay is inexcusable.

IV. Orders made prior to the attempted intervention, as well as proceedings had subsequent to the order from which appeal is taken, are not affected by nor relevant to this appeal.

ARGUMENT

I.

It is here contended that appellants had no absolute right to intervene. At the very most their intervention was within the court's discretion. If so, the order denying intervention was not appealable because not final. The argument upon this point demonstrates both (1) that the appeal should be dismissed, and (2) that the appeal is without merit.

A. The Act of June 25, 1929, under which this suit is brought does not confer upon appellants a right to intervene. On the contrary it clearly contemplates that no such issue as that tendered by appellants shall be tried.

Since appellants assert that Section 5 of the Act of June 25, 1929, 46 Stat. 41, confers on them an unconditional right to intervene here, that assertion should first be examined. The portion of Section 5 which contains the language relied on by appellants reads as follows:

In the judicial proceedings contemplated by this Act there shall be presented, and the court or courts shall consider, make findings relating to, and determine *to what extent the terms, conditions, and covenants, expressed or implied, in said granting Acts have been performed* by the United States, and by the Northern Pacific Railroad Company, or its successors, *including the legal effect of the foreclosure of any and all mortgages* which said Northern Pacific Railroad Company claims to have placed on said granted lands by virtue of authority conferred in the said resolution of May 31, 1870, and *the extent to which said proceedings and foreclosures meet the requirements of said resolution* with respect to the disposition of said granted lands, and relative to what lands, if any, have been wrongfully or erroneously patented or certified to said companies, or either of them, as the result of fraud, mistake of law or fact, or through legislative or administrative misapprehension as to the proper construction of said grants or Acts supplemental or relating thereto, or otherwise, and the United States and the Northern Pacific Railroad Company, or the Northern Pacific Railway Company, or any other proper person, shall be entitled to have heard and determined by the court *all questions of law and fact and all other claims and matters which may be germane to a full and complete adjudication of the respective rights of the United States and said companies or their successors in interest* under said Act of July 2, 1864, and said joint resolution of May 31, 1870, and in other Acts or resolutions supplemental thereto, and all other questions of law and fact presented to the joint congressional committee appointed under authority of the joint resolution of Congress of June 5, 1924 (Forty-third Statutes, page 461), notwithstanding that such matters may not be specifically mentioned in this enactment. [Italics supplied].

It is apparent from the language of the single sentence

here quoted that "the legal effect of the foreclosure" is specified as one of the items to be considered by the court in determining "to what extent the terms, conditions and covenants . . . in said granting Acts have been performed." That is, the court is to find whether the "proceedings and foreclosures meet the requirements" of the resolution, or whether they constitute a breach thereof. The controlling words are: "to what extent the terms . . . have been performed."

Appellants assume that the section directs the court to determine whether, under the circumstances surrounding the foreclosure of the mortgages, the Northern Pacific Railway Company succeeded to the rights of the Northern Pacific Railroad Company. The section says no such thing. Consideration of these "proceedings and foreclosures" is limited to their bearing upon the question "to what extent the terms . . . have been performed."

The language near the end of the sentence permitting the railroad company, the railway company, "or any other proper person," to have certain matters determined, limits such right to claims and matters "which may be germane to a full and complete determination of the respective rights of the United States and said companies" under such granting Acts.

Obviously the Act did not contemplate that litigation to determine the respective rights of the United States and of the beneficiaries of the land grant should be cluttered up with a complaint in the nature of a stockholder's bill, designed to litigate the internal quarrels of the Northern Pacific companies. So far as the United

States was concerned, it had no interest in such a dispute.

The Supreme Court, in the very case giving rise to the whole inquiry, *United States* v. *Northern Pac. Ry.*, 256 U. S. 51, said (p. 58):

> The rights and obligations of the original railroad company arising out of the grant have long since passed to the present railway company and there is no need here for distinguishing one company from the other.

Congress had no more doubt about this proposition than had the Supreme Court, for the very Act here in question specifically recited that the Northern Pacific Railway Company was the successor of the Northern Pacific Railroad Company. Thus in Section 1 reference is made to indemnity lands available "to the Northern Pacific Railroad Company *or its successor, the Northern Pacific Railway Company.*" [Italics supplied] This language is again repeated twice in the same section, once in Section 2, once in Section 4, and once in Section 6.

That there was no question in the mind of Congress that the railway company was in fact the successor of the railroad company (the only controversy being as to whether, in executing and foreclosing the mortgages referred to, the companies had breached the terms of the grant so as to open it to forfeiture by Congress) is made plain by the history of the Act of June 25, 1929. This history may be briefly summarized as follows:

1. On February 23, 1924, President Coolidge addressed a letter to the chairman of the House Committee on Public Lands in support of a proposed joint

resolution directing the Secretary of the Interior to withhold adjustment of the land grants until Congress should have made an inquiry. (Joint Committee Hearings, vol. 1. p. 5). The letter enclosed a communication of the Secretary of Agriculture stating that "the defaults of the Northern Pacific were numerous and flagrant." The letter also enclosed a brief (Hearings, p. 27) which discussed in detail the execution and foreclosure of certain mortgages as in violation of the joint resolution of May 31, 1870, and as ground for forfeiture, citing the case of *Oregon & Cal. R. R.* v. *United States,* 238 U. S. 393.

2. June 5, 1924, Congress passed the joint resolution suggested by the President 43 Stat. 461, and providing for a joint committee "to make a thorough and complete investigation of the land grants of the Northern Pacific Railroad Company, *and its successor, the Northern Pacific Railway Company.*" [Italics supplied].

3. The joint congressional committee began its hearings March 18, 1925 and concluded the taking of testimony on June 29, 1926. The testimony and incorporated documents cover some 5086 pages. Mr. D. F. McGowan, Attorney for the United States Forest Service, who had represented the United States throughout the hearings, on December 1, 1926, at the request of the committee, prepared a digest summary of the Government's case made at the hearings (Hearings p. 5087). In the summary preceding the digest it was stated:

> "all of the lands of the grant passed to the reorganized Northern Pacific Railway Co." (p. 5093).

In the digest of the evidence, under the heading relating to the claim that the foreclosure proceedings and the disposition of the mortgaged property was in violation of the terms of the joint resolution of May 31, 1870, (p. 5174) specific reference is made to the 1896 reorganization of the Northern Pacific (p. 5231) and it is stated: (p. 5247)

> "Under the 1896 reorganization proceedings the Northern Pacific Railway Company acquired the land grant and other properties of the Northern Pacific Railroad Company."

In this connection, attention was called to the recital by the Supreme Court in the *Forest Reserve Case,* 256 U. S. 51, to the effect that the rights and obligations arising out of the grant have passed to the presерent railway company, and it is stated: (p. 5248)

> It is obvious therefore that the present Northern Pacific Railway Co. carry all of the obligations of the Northern Pacific Railroad Co. arising out of the grant and that by succeeding to the rights of the Northern Pacific Railroad Co. the Northern Pacific Railway Co. is responsible for the obligations of the Northern Pacific Railroad Co.

In short, it was the Government's position at the hearings that the Supreme Court was correct in reciting that the railway company had succeeded to the rights of the railroad company.[11]

4. On December 29, 1926, also at the request of the

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[11]The record of the Joint Committee Hearings shows that Mr. McGowan, as investigator for the committee, was careful to take no part, and to lend no aid to either side, in this minority stockholders' controversy. "I did not want anybody to have any semblance of anything that would lead to the conclusion that my case was tied in any way with this old case of the stockholders." (See Joint Committee Hearings, p. 4649-4651).

committee, Mr. McGowan transmitted to the committee a form of a proposed bill outlining the powers of Congress with respect thereto, and reciting: (p. 5311)

> Congress should take action to terminate any unsatisfied indemnity selection rights or privileges *now held by the Northern Pacific Railway Co.*, and arising under the Northern Pacific land grants. [Italics supplied].

5. On March 3, 1927 by joint resolution (44 Stat. 1405) the joint committee was continued and the Attorney General was directed to advise it as to what legal or legislative action should in his judgment be taken in the matter before the committee.

6. On February 8, 1928 pursuant to the requirement of this joint resolution, the Attorney General transmitted a memorandum (Hearings, p. 5485) commenting in detail upon the suggestions which had been made by the Forester to the joint committee and with respect to which the hearings had been had. With reference to the suggestions 18 and 19 relating to the foreclosure proceedings and the disposition of the granted lands, the Attorney General's memorandum summarizing the history of the foreclosure and reorganization proceedings advised the committee that (Hearings, p. 5504):

> The result was that the railway company acquired the land grant and there was no compliance with the sales provisions contained in the resolution of May 31, 1870 . . . The conclusion reached is that the provisions of the resolution of May 31, 1870, applied to the lands covered by both grants and were enforceable covenants and that they were not performed by the company. Under the authority of *Oregon & California Railroad Co.* v. *United States*

(238 U. S. 393), *the breach of these covenants entitled the United States to revest in itself the granted lands remaining in the hands of the company.* [Italics supplied].

7. March 2, 1929 the joint committee made its report, Cong. Rec., 70th Cong., 2d Sess., p. 5118, reporting a bill in substantially the same form as the Act of June 25, 1929. In connection with the report Mr. Colton for the committee made particular reference to the memorandum of the Attorney General of February 8, 1928, and in the course of his remarks in the House stated (Cong. Rec., 70th Cong., 2d Sess., p. 5121-5122):

> In arriving at the conclusion that the forfeiture should be declared, your committee was influenced by, among other things: . . . (c) the collusive sales of the granted lands in violation of and in evasion of the provisions of the resolution of May 31, 1870, in connection with the foreclosure of the mortgages coincident with the 1875 and the 1896 reorganizations of the Northern Pacific Railroad Co. . . . These propositions were given weight, singly and collectively, by your committee in arriving at the conclusion that the forfeiture covered by section 2 of H. R. 17212 be declared.

8. At the next session of Congress and on April 29, 1929 the joint committee again reported the bill and made a similar report incorporating Mr. Colton's remarks in the report (H. Rep. No. 9190, 71st. Cong., 1st Sess., Rep. No. 2).

9. The enactment of the Act of June 25, 1929 followed, and on July 31, 1930 the Bill of Complaint was filed (R. 1-147). The 5536 pages of the Joint Committee Hearings are barren of any suggestion that the committee or Congress had any interest whatever in

a determination of the claims now asserted by these appellants. On the contrary, the whole record of the hearings discloses that when Congress in the Act of June 25, 1929, used the words, "or its successor, the Northern Pacific Railway Company," it did so advisedly, accepting as a fact the statement to this effect in the *Forest Reserve Case,* 256 U. S. 51. The reference in Section 5 to the "legal effect of the foreclosure of any and all mortgages" related solely to the required findings "to what extent the terms, conditions, and covenants" had been performed, as the same had a bearing upon the forfeiture declared in Section 2.

That it was the intention of Congress thus to treat the railway company as unquestionably the successor of the railroad company, and that Congress did not contemplate that any such issue should be tried in this suit is made manifest by comparing the outright recital in the Act of June 25, 1929, that the railway company was the successor, with the carefully worded proviso in the Act of July 1, 1898, 30 Stat. 620 as follows:

> *And provided further,* that nothing herein contained shall be construed as intended or having the effect to recognize the Northern Pacific Railway Company as the lawful successor of the Northern Pacific Railroad Company in the ownership of the lands granted by the United States to the Northern Pacific Railroad Company, under and by virtue of foreclosure proceedings against said Northern Pacific Railroad Company in the courts of the United States, but the legal question whether the said Northern Pacific Railway Company is such lawful successor of the said Northern Pacific Railroad Company, should the question be raised, shall be determined wholly without reference to the provi-

> sions of this Act, and nothing in this Act shall be construed as enlarging the quantity of land which the said Northern Pacific Railroad Company is entitled to under laws heretofore enacted.

Obviously all question on this point was now deemed resolved. If, as asserted by the appellants, the Attorney General refused to put the matters now urged by the would-be interveners in issue, he too must have understood the Act of June 25, 1929, to mean what it says, and not what appellants say it says.

Just why the Government should be interested in the internal quarrels of the Northern Pacific companies is difficult to perceive. It would be most unreasonable to suppose that Congress would require this suit which was to settle "the respective rights of the United States and said companies or their successors under said Act of July 2, 1864, and said joint resolution of May 31, 1870," to be complicated by this purely collateral claim of a few minority stockholders. What is here said with reference to the Act of June 25, 1929, and its legislative history, discloses that Congress intended that no such extraneous issues should be here determined.

The proper conclusion is that reached in *United States* v. *Union Pacific R. R. Co.,* 98 U. S. 569, 608, as follows:

> We are bound, therefore, to presume that Congress did not intend that this special remedy should include any thing beyond the matters which we have seen were so carefully and so specifically mentioned as grounds of relief.

B. The general rule is that denial of intervention is not an appealable order.

At the outset appellants are confronted by the proposition that ordinarily an order denying leave to inter-

vene is not a final or appealable order. The ordinary rule was well stated in *Credits Commutation Co.* v. *United States* 177 U. S. 311, 315 as follows:

> When such an action is taken, that is to say, when leave to intervene in an equity case is asked and refused, the rule, so far as we are aware, is well settled that the order thus made denying leave to intervene is not regarded as a final determination of the merits of the claim on which the intervention is based, but leaves the petitioner at full liberty to assert his rights in any other appropriate form of proceeding. Such an order not only lacks the finality which is necessary to support an appeal, but it is usually said of it that it cannot be reviewed, because it merely involves an exercise of the discretionary powers of the trial court.

The rule stated has been recognized in a multitude of cases including the following:

United States v. *California Canneries,* 279 U. S. 553.

Rodman v. *Richfield Oil Co. of California,* 66 F. (2d) 244 (C. C. A. 9);

Baker v. *Spokane Sav. Bank,* 71 F. (2d) 487 (C. C. A. 9);

Washington v. *United States,* 87 F. (2d) 421 (C. C. A. 9).

1. The exception applied in certain cases where the applicant for leave to intervene has an immediate interest in a fund, has no application here where there may never be a fund. Furthermore appellants do not invoke this exception.

It is true that there are exceptions to the rule that an order denying leave to intervene is not appealable. The whole rule was stated in *United States* v. *California Canneries,* 279 U. S. 553, 556 (omitting citations) as follows:

> It [the lower court] did not refer to the decisions which hold that an order denying leave to intervene is not appealable, except where he who seeks to intervene has a direct and immediate interest in a *res* which is the subject of the suit.

Likewise in *Credits Commutation Co.* v. *United States*, 177 U. S. 311, 315, 316, the exceptional case is described as follows:

> It is doubtless true that cases may arise where the denial of a third party to intervene therein would be a practical denial of certain relief to which the intervenor is fairly entitled, and which he can only obtain by an intervention. Cases of this sort are those where there is a fund in court undergoing administration to which a third party asserts some right which will be lost in the event that he is not allowed to intervene before the fund is dissipated.

A careful reading of appellants' brief discloses that they base their right to intervene solely upon their interpretation of the Act of June 25, 1929, and not upon an assertion that they should be permitted to protect their interest in a fund. This latter claim was put forward as an alternative prayer in their petition and motion "to review, revise and amend" filed March 11, 1938 (R. 1192, 1204), wherein they asked that the court reserve for them an opportunity to present their contentions "at a later date in this court, after the court has established a fund." The court did this very thing in its order of March 22, 1938 (R. 1209, 1210). Hence it appears that insofar as appellants sought protection in respect to a fund, their request in this regard was granted, and they have no ground for complaint. This portion of their petition and motion "to review," etc., was a clear rec-

ognition that no fund then existed in which they might have an immediate interest.

Founding their asserted right to intervene upon a mistaken interpretation of the Act of June 25, 1929, appellants proceeded to make it clear that they were insisting as a matter of absolute right under the statute, upon an immediate determination of the issue which they seek to present, namely, whether the railway company is or is not the successor of the railroad company and as such, the owner of the rights created by the land grant. Many of their moving papers disclose that they demand that the issues of the suit be revised and reformed in deference to their demand that this issue be determined forthwith. Thus on February 19, 1938, and after they had presented their motion and petition for leave to intervene, they filed a motion "to construe, modify and/or amend the report of Special Master Graves filed July 26, 1937" (R. 1182). This was in effect a motion to require the court to determine the same issue here and now, notwithstanding the fact that no such issue was made by the pleading, as the Master had indicated in his first report (R. 641). On the same day, the appellants filed their so-called "exceptions" to the report of the Master (R. 1185). In this document they adopt all of the exceptions previously taken by counsel for the railroad and the railway company, but add a further exception in effect demanding that the report of the Special Master be disapproved for its failure to render a report upon the issue sought to be raised by the intervening petition. On March 11, 1938, the appellants filed a petition and motion "to review,

revise and amend decree or order entered in this cause March 9, 1938" (R. 1190), in which complaint is made that the Attorney General was derelict and violated the mandate of Congress by failing to put in issue the question whether the railroad or the railway company was entitled to the property involved in the suit. On March 16, 1938, the appellants moved to dismiss the bill of complaint on the same grounds (R. 1207).

The petition in intervention itself makes reference to the appellants' answer and cross-bill (R. 952), and the same is incorporated therein by reference (R. 1043). By this pleading the appellants sought to answer the bill of complaint and to put sundry allegations of the bill in issue exactly as though those issues had not been previously tried and many of them disposed of by the court. No suggestion is made that the answer filed by the railway company to the bill of complaint was insufficient so far as the merits of the controversy between the United States and the defendants were concerned. On the contrary, the assertion is that in each case the answer of the railway company is "fairly accurate" (R. 963 *et seq.)* except insofar as the claim is made in the answer of the railway company that the property and rights involved in the suit belong to it.

It is thus clear that when the petition in intervention came on for hearing before Judge Webster, he had a right to assume that intervention was sought for the purpose of putting the appellants in a position where they might be entitled to an immediate determination of the issue which they sought to present through their petition in intervention. Indeed as late as August 29,

1938, we find the appellants still undertaking to file a motion (R. 1258) seeking to prevent any further proceedings in the suit until appellants' new issue be injected and disposed of in the cause.

It will be recalled that at the time the petition in intervention was called up for hearing before Judge Webster, he was in the midst of hearing argument upon exceptions to the Master's second report. The report had been filed July 26, 1937 and exceptions were taken by counsel for the respective parties within the time fixed by the rules. Judge Webster knew that after he had completed his review of the Master's report and had disposed of the exceptions taken thereto, his order made upon this phase of the case would probably be reviewed by the Supreme Court under the authority of the Special Act of May 22, 1936, 49 Stat. 1369, set out in full in the Appendix, *infra,* which authorizes a direct appeal from this and the prior interlocutory order on a review of the Master's first report. This appeal, as pointed out in the statement of the case, *supra,* p. 14, would precede the determination of the amount of any compensation which might be awarded against the United States.

It is apparent that upon such an appeal the Supreme Court may sustain the Government's contention that all rights of the grantee under the land grant have terminated and become forfeited, or that such rights have become barred by the fraud or other misconduct of the railroad company or of the railway company. The Supreme Court may sustain the Government's position with respect to the Indian Point, and hold that in consequence of the facts pleaded neither the railroad com-

pany nor the railway company is entitled to any further lands. The Supreme Court may hold that certain of the issues tried must be retried and additional findings made. It may hold that the trial court shall proceed with a further accounting for the purpose of ascertaining what if any compensation is due to or from the United States. But certain it is that until the decision of the Supreme Court be handed down, no fund will have been established as to which the exceptions to the ordinary rule relating to intervention might be made to apply. It is the position of the United States that under the provisions of the Act of June 25, 1929, there never will be a time under any conceivable state of facts when the court will be authorized or empowered to try in this suit the issues sought to be presented by the interveners or to permit them to intervene for that purpose. That point aside, however, it is clear that no rule of law or equity required Judge Webster to proceed to try issues which were purely hypothetical and which might become entirely moot on the disposition of the appeal by the Supreme Court. There is no requirement that intervention must be allowed for the purpose of requiring the court to engage in a purely speculative investigation.

It will be noted that the decisions which recognize the exception to the ordinary rule and permit intervention in certain cases in which the intervener makes claim to a fund in the hands of the court, have been careful to point out that that exception applies only when the intervener has an *immediate* interest in the fund, or where the circumstances are such that the fund is likely to be dissipated.

Thus in *United States* v. *California Canneries,* 279 U. S. 553, 556, the language of the court is "except where he who seeks to intervene has a *direct* and *immediate* interest in a *res* which is the subject of the suit." [Italics supplied]. And in *Credits Commutation Co.* v. *United States,* 177 U. S. 311, 316, the exception is said to apply only "where there is a fund in court undergoing administration to which a third party asserts some right which will be lost in the event that he is not allowed to intervene *before the fund is dissipated.*" [Italics supplied].

That there was no possibility that any right asserted by the appellants would be lost within the meaning of the rule last stated is made doubly clear by the recital by Judge Webster that his then denial of leave to intervene was without prejudice to the rights of the appellants to assert their claim "when the fund, if any, to be distributed by the United States is established and fixed" (R. 1210).

An order of the trial court denying intervention "without prejudice," was expressly approved by this court in *King* v. *Barr,* 262 Fed. 56, 60, 62; *cert. denied* 253 U. S. 484.

C. The appellants do not make a sufficient showing of inadequate representation.

A careful examination of the proposed petition fails to disclose any claim by petitioners that the claim against the United States, for lands or compensation, is not being adequately presented. On the other hand, the numerous papers filed by the appellants show positively that so far as the claim against the United States is concerned, they have no complaint to make. Thus their

"answer and cross-bill," referred to in the petition for intervention, repeatedly speaks of the answer of the railway company as "fairly accurate" (R. 963,964,965, *et seq.)* When appellants attempted to file exceptions they adopted *in toto* those of the railway company (R. 1185).

Rule 24 of the new Federal Rules of Civil Procedure, relating to intervention, though not applicable here because not in effect at the time of the order, is nevertheless declaratory of the rules heretofore stated by the courts. That portion relating to "Intervention of Right" reads as follows:

> Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof.

It requires no more than a reading of subdivision (2) above to make clear the proposition that this attempted intervention involves so much claim. See *New York City* v. *New York Tel. Co.,* 261 U. S. 312, 316; *O'Connell* v. *Pacific Gas & Electric Co.,* 19 F. (2d) 460 (C. C. A. 9); *Difani* v. *Riverside County Oil Co.,* 201 Cal. 210, 215.

It must be borne in mind that what we are here discussing is the question of adequate representation in respect to the claims against the United States. As the suit now stands there is no other issue before the court than those made necessary by an inquiry as to what

compensation if any may be due from the United States. It is clear that the evidence and the law to establish such claims against the United States has been fully and adequately presented.

No assertion is made that the railroad company or the railway company have not done all that could possibly be done in the establishment of a claim against the United States. So far as the "respective rights of the United States and said companies"[12] are concerned, appellants have no more right to intervene than any other corporate stockholders. Bates, Federal Equity Procedure, sec. 57.

D. The denial of intervention by the trial court was not a denial of relief.

Speaking of the rare exceptions to the general rule that the granting or denial of leave to intervene is within the discretion of the trial court, the Supreme Court in *Credits Commutation Co.* v. *United States,* 177 U. S. 311, said (pp. 315-316):

> It is doubtless true that cases may arise where the denial of a third party to intervene therein would be a practical denial of certain relief to which the intervenor is fairly entitled, and which he can only obtain by an intervention.

This suggestion that intervention is recognized as an absolute right only when no other appropriate form of proceeding is open to the intervenor, was pointed out by this court in *Washington* v. *United States,* 87 F. (2d) 421, 433-434 (C. C. A. 9), as follows:

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[12]This is the language of Section 5 of the Act of June 25, 1929, which refers to "all questions of law and fact and all other claims and matters which may be germane to a full and complete adjudication of the respective rights of the United States and said companies.

> Ordinarily, the denial of the petition adjudicates nothing but the right to intervene, and has no force as res judicata on the merits. Such a denial 'leaves the petitioner at full liberty to assert his right in any other appropriate form of proceeding.' In other words, the petitioner in an independent preceeding of some kind may litigate the same question which he seeks to litigate by intervention. *If there is any 'other appropriate form of preceeding' open to the intervenor, the order denying intervention is not final, and therefore not appealable, because the order does not 'terminate the litigation between the parties on the merits of the case'.* [Italics supplied].

Is there any conceivable reason why the appellants are not at liberty to bring an independent stockholders' bill in any court of competent jurisdiction to determine the extraneous issues which they seek to inject in this suit? That very thing was done in the Hoover suit to which many references are made in their petition (R. 1044, 1052). Indeed, inasmuch as the appellants' claims, if they be valid at all, extend not only to the railway's interest in the land grant but to its tracks, depots, rolling stock, bank account, and other property of every kind and description, it would appear that an independent suit would afford the appellants much more adequate relief.

The assertion that the United States is a necessary party to a suit between the railroad company and the railway company to determine which is the owner of the land grant is utterly unsupported and manifestly absurd. The rule relating to necessary and indispensable parties in a suit of that kind, takes account of the distinction between an interest in the subject matter and an interest in the object of the suit. As stated in Story, Equity

Pleadings, (9th ed.) sec. 72, "It is not all persons who have an interest in the *subject*-matter of the suit, but, in general, those only who have an interest in the *object* of the suit, who are ordinarily required to be made parties." It is for this reason that a mortgagee is not a necessary party to a suit to set aside a fraudulent conveyance of mortgaged property *Venable* v. *United States Bank,* 2 Pet. 107, or a trustee in a suit solely between *cestuis que trustent.* See *Walden* v. *Skinner,* 101 U. S. 577, 588-589. In holding that a bankrupt is not a necessary party to a bill filed by the assignee in bankruptcy to set aside the bankrupt's conveyance of real and personal property as a fraud upon creditors, the Supreme Court said in *Buffington* v. *Harvey,* 95 U. S. 99, 103:

> As to the bankrupt himself, the conveyance was good; if set aside, it could only benefit his creditors. He could not gain or lose, which ever way it might be decided.

It is obvious that the United States cannot gain or lose no matter what may be the decision as to whether the railway company is or is not the successor of the railroad company. The United States has no interest in that contention.

The cases cited by the appellants in an effort to demonstrate that the United States would be a necessary or indispensable party in such an independent proceeding, have not the remotest application to the point involved. They are so obviously beside the point as not to warrant comment in this brief.

If there were any such rule as that asserted by appellants to the effect that in a dispute by claimants to public lands, the United States is a necessary or indis-

pensable party, then in view of the oft-repeated rule that a court of equity will on its own motion, decline to proceed in the absence of indispensable parties, it is passing strange that in none of the following cases, all of which involve controversies between rival claimants to public lands, most of them under land grants and many of them under the very land grant here involved, was there any suggestion by the court or counsel that the United States was a necessary party:

(1) *Ryan* v. *Railroad Co.*, 99 U. S. 382.
(Homesteader against land grant railroad. Attorney General granted leave to participate in oral argument.)

(2) *Missouri, K. & T. Ry.* v. *Kansas Pac. Ry.*, 97 U. S. 491.
(Title to land claimed by two railroads under grants from the United States.)

(3) *Northern Lumber Co.* v. *O'Brien*, 204 U. S. 190.
(Same, Northern Pacific grant in controversy.)

(4) *Railroad Co.* v. *Baldwin*, 103 U. S. 426.
(Title to land within right-of-way between railroad grantee of the United States and an individual.)

(5) *Buttz v. Northern Pacific R. R.*, 119 U. S. 55.
(Railroad claiming under land grant against individual claiming by preemption.)

(6) *St. Paul & Pacific R. R.* v. *Northern Pacific* R. R., 139 U. S. 1.
Title to lands claimed by litigants under separate land grants.)

(7) *Bardon* v. *Northern Pacific R. R.*, 145 U. S. 535.
(Land grant railroad against a preemptioner.)

(8) *Northern Pacific R. R.* v. *Musser-Sauntry Co.,* 168 U. S. 604.
(Railroad grantee against successor of earlier railroad grantee.)

(9) *Sjoli* v. *Dreschel,* 199 U. S. 564.
(Patentee against grantee of Northern Pacific.)

(10) *Weyerhauser* v. *Hoyt,* 219 U. S. 380.
(Grantee of Northern Pacific against purchaser under timber and stone act.)

The case of *Skeen* v. *Lynch,* 48 F. (2d) 1044 (C. C. A. 10), upon which appellants rely, is distinguished and fully explained by this court in *Washington* v. *United States,* 87 F. (2d) 421, 429 (C. C. A. 9).

II. The denial of the right to intervene was a proper exercise of the discretion of the trial court because to allow appellants to intervene would unduly complicate and vex the issues to be tried by bringing into the suit a controversy solely between interveners and the defendants, a field of litigation not in issue between or open to the original parties.

Pursuant to the mandate of the Act of June 25, 1929, the bill of complaint was filed against the Northern Pacific Railroad Company "and its successor, the Northern Pacific Railway Company". Accordingly the bill alleges that the railway company is the successor to the railroad company (R. 35). Hence, the Master, in his first Report correctly pointed out that the bill tendered no issue upon this point (R. 641).

It is therefore clear that to allow the intervention would unduly complicate and vex the issues to be tried by the District Court. This is true not merely because, as previously pointed out, the allowance of the intervention would have projected the court in the trial of issues

which might become moot after the decision of the Supreme Court on the appeal authorized by the Act of May 22, 1936, but because the new issues presented by the appellants would bring into the suit a controversy solely between interveners and defendant, which is a field of litigation not in issue between or open to the original parties.

As stated in *Chandler Co.* v. *Brandtjen, Inc.,* 296 U. S. 53, 58:

> Issues tendered by or arising out of plaintiff's bill may not by the intervenor be so enlarged. It is limited to the field of litigation open to the original parties.

So also in *Aiken v. Cornell,* 90 F. (2d) 567, C. C. A. 5), the court said (p. 568):

> * * * there was no abuse of discretion in disallowing the interventions upon the finding the court made that it would unduly complicate and vex the issues to be tried by bringing into the suit other persons having individual interests not at all affected by the claims advanced nor the decree to be entered on it.

As indicated by Rule 24 of the Federal Rules of Civil Procedure, even "permissive" intervention is limited to a case "when an applicant's claim or defense and the main action have a question of law or fact in common." *Bache* v. *Hinde,* 6 F. (2d) 508, 513, (C. C. A. 6).

Indeed, it is obvious from the frame of the petition in intervention that it relates to property and rights wholly foreign to this suit, for the petition lays claim to all assets of the railway company (R. 1026, 1040, 1172), while the original suit relates solely to the land grant. Surely such an intervention cannot be in subordination to the main action as required by Equity Rule 37.

III. The Application to Intervene Was Not Timely.

As has been pointed out, pp. 37-40, *supra,* appellants are demanding intervention, not for the protection of an interest in a fund, but for the purpose of injecting their new issues forthwith into this suit. They attempt to interpose an answer to the entire bill (R. 952), they move to dismiss the bill (R. 1207), they file exceptions to the Master's report (R. 1185), and they move to strike the stipulation of the parties (R. 1251) by which certain omissions in the testimony may be supplemented by affidavits and other matters incidental to the court's review of the Master's report are disposed of (R. 1258). It is obvious that the only purpose of an intervention at this stage of the proceedings would be to permit appellants to demand an immediate hearing upon matters such as these, and it is also obvious that an application for such an intervention is not timely.

By their own showing appellants have known of their present claims since 1896 (R. 1043). They have known of the Hoover suit since 1900 (R. 1044). They claim they

> had since 1900 continuously sought a Congressional Investigation * * * and * * * believe they can state, without fear of successful challenge, that but for the continuous acts and efforts of the Petitioners, the Joint Congressional Committee investigation of 1925, resulting in the Act of June 25, 1929, would never have been obtained, or the Act passed, or this suit authorized but for such efforts of the Petitioners * * *.

(Assignment of Error No. XVIII, R. 1226-1227). They have known of this suit since its institution on July 31, 1930, and therefore have known that the bill of complaint tenders no issue as to whether the railway

company is the successor of the railroad company (R. 35).

The delay in moving to intervene is wholly unexcused and inexcusable. Under such circumstances Judge Webster was acting entirely within his discretion in denying the request for leave to intervene.

The applicable rule was stated by this court in *Merriam* v. *Bryan,* 36 F. (2d) 578, 579, (C. C. A. 9) as follows:

> It will thus be seen that more than three years elapsed between the commencement of the principal suit and the filing of the motion for leave to intervene. The rule is well settled that applications of this kind must be in subordination to and in recognition of the propriety of the main proceedings, that they must be timely made, and that they are addressed to the sound discretion of the court. Equity Rule 37; Buel v. Farmers' Loan & Trust Co. (C. C. A.) 104 F. 839, 842. The rule is well stated in the Buel Case, in an opinion participated in by Judges Lurton and Day:
>
> > "It seems to be quite well settled that the granting leave to intervene in a case to which the petitioner is not a party is a matter addressed to the discretion of the court, to be exercised upon consideration of all the circumstances of the case. Among other things, the court will regard the seasonableness of the application, and the extent to which those already parties to the suit may be injuriously affected by admitting the new party to assert his claims and have them litigated at that stage of the case. The question for the court will be whether the petitioner has slept upon his rights and unreasanably delayed his application. Another will be whether it will be more convenient that he litigate his rights upon an independent bill."

The present application does not satisfy any of these requirements. The appellant had full knowlelge of the pendency of the principal suit from the beginning, was a witness at the trial, and has offered no excuse whatever for the delay.

IV. Proceedings had prior to or subsequent to the attempted intervention from which this appeal is taken are not relevant to this appeal.

For reasons not made plain appellants have inserted in the appendix to their brief numerous purported assignments of error which they undertake to discuss in their brief. Somewhat similar assignments of error are shown in the printed record as filed March 22, 1938 (R. 1217). These related to a petition for appeal to the Supreme Court and have no connection with the appeal pending here.

An examination of the subject matter of these so-called assignments of error will disclose that most of them relate to orders and rulings which long antedate appellants' attempted intervention. Even if appellants were permitted to intervene, they could not raise any question with reference to those matters by reason of the provision of Equity Rule 37 that "intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding."

For some reason, likewise unknown, appellants have inserted in the printed record matters which transpired long after the entry of the order from which they appeal. Obviously they cannot rely upon what occurred after the order was made for the purpose of putting Judge Webster in error.

It is submitted that under all conceivable circum-

stances the order appealed from was at least within the discretion of the District Court, that the order was therefore not appealable, and that in any event the appeal is without merit. The appeal should be dismissed or the order of the court below affirmed.

Respectfully submitted,

WALTER L. POPE,
Special Assistant to the
Attorney General.

E. E. DANLY,
Special Assistant to the
Attorney General.

APPENDIX

A

Act of June 25, 1929, 46 Stat. 41:

Chap. 41.—An Act To alter and amend an Act entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific Coast, by the northern route," approved July 2, 1864, and to alter and amend a joint resolution entitled "Joint resolution authorizing the Northern Pacific Railroad Company to issue its bonds for the construction of its road and to secure the same by mortgage, and for other purposes," approved May 31, 1870; to declare forfeited to the United States certain claimed rights asserted by the Northern Pacific Railroad Company, or the Northern Pacific Railway Company; to direct the institution and prosecution of proceedings looking to the adjustment of the grant, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any and all lands within the indemnity limits of the land grants made by Congress to the Northern Pacific Railroad Company under the Act of July 2, 1864, and the resolution of May 31, 1870, which, on June 5, 1924, were embraced within the exterior boundaries of any national forest or other Government reservation and which, in the event of a deficiency in the said land grants to the Northern Pacific Railroad Company upon the dates of the withdrawals of the said indemnity lands for governmental purposes, would be, or were, available to the Northern Pacific Railroad Company or its successor, the Northern Pacific Railway Company, by indemnity selection or otherwise in satisfaction of such deficiency in said land grants, are hereby taken out of and removed from the operation of the said land grants, and are hereby retained by the United States as part and

parcel of the Government reservations wherein they are situate, relieved and freed from all claims, if any exist, which the Northern Pacific Railroad Company or its successor, the Northern Pacific Railway Company, may have to acquire the said lands by indemnity selection or otherwise in satisfaction of the said land grants: *Provided,* That for any or all of the aforesaid indemnity lands hereby retained by the United States under this Act the Northern Pacific Railroad Company or its successor, the Northern Pacific Railway Company, or any subsidiary of either or both, or any subsidiary of a subsidiary of either or both, shall be entitled to and shall receive compensation from the United States to the extent and in the amounts, if any, the courts hold that compensation is due from the United States.

Sec. 2. That all of the unsatisfied indemnity selection rights, if any exist, claimed by the Northern Pacific Railroad Company or its successor, the Northern Pacific Railway Company, or any subsidiary of either or both, or any subsidiary of a subsidiary of either or both, or by any grantee or assignee of either or both, together with all claims to additional lands under and by virtue of the land grants contained in the Act of July 2, 1864, and resolution of May 31, 1870, or any other Acts of Congress supplemental or relating thereto, are hereby declared forfeited to the United States.

Sec. 3. The rights reserved to the United States in the Act of July 2, 1864, to add to, alter, amend, or repeal said Act, and in the resolution of May 31, 1870, to alter or amend said resolution, are not to be considered as fully exercised, waived, or destroyed by this Act or the exercise of the authority conferred hereby; and the passage of this Act shall not be construed as in anywise evidencing the purpose or intention of Congress to depart from the policy of the United States expressed in the resolution of May 31, 1870, relative to the disposition of granted lands by said grantee, and the right is

hereby reserved to the United States to, at any time, enact further legislation relating thereto.

Sec. 4. The provisions of this Act shall not be construed as affecting the present title of the Northern Pacific Railroad Company or its successors, the Northern Pacific Railway Company, or any subsidiary of either or both, in the right of way of said road or lands actually used in good faith by the Northern Pacific Railway Company in the operation of said road.

Sec. 5. The Attorney General is hereby authorized and directed forthwith to institute and prosecute such suit, or suits, as may, in his judgment, be required to remove the cloud cast upon the title to lands belonging to the United States as a result of the claim of said companies, and to have all said controversies and disputes respecting the operation and effect of said grants, and actions taken under them, judicially determined, and a full accounting had between the United States and said companies, and a determination made of the extent, if any, to which the said companies, or either of them, may be entitled to have patented to them additional lands of the United States in satisfaction of said grants, and as to whether either of the said companies is lawfully entitled to all or any part of the lands within the indemnity limits for which patents have not issued, and the extent to which the United States may be entitled to recover lands wrongfully patented or certified. In the judicial proceedings contemplated by this Act there shall be presented, and the court or courts shall consider, make findings relating to, and determine to what extent the terms, conditions, and covenants, expressed or implied, in said granting Acts have been performed by the United States, and by the Northern Pacific Railroad Company, or its successors, including the legal effect of the foreclosure of any and all mortgages which said Northern Pacific Railroad Company claims to have placed on said granted lands by virture of authority conferred in the said resolution of

May 31, 1870, and the extent to which said proceedings and foreclosures meet the requirements of said resolution with respect to the disposition of said granted lands, and relative to what lands, if any, have been wrongfully or erroneously patented or certified to said companies, or either of them, as the result of fraud, mistake of law or fact, or through legislative or administrative misapprehension as to the proper construction of said grants or Acts supplemental or relating thereto, or otherwise, and the United States and the Northern Pacific Railroad Company, or the Northern Pacific Railway Company, or any other proper person, shall be entitled to have heard and determined by the court all questions of law and fact, and all other claims and matters which may be germane to a full and complete adjudication of the respective rights of the United States and said companies, or their successors in interest under said Act of July 2, 1864, and said joint resolution of May 31, 1870, and in other Acts or resolutions supplemental thereto, and all other questions of law and fact presented to the joint congressional committee appointed under authority of the joint resolution of Congress of June 5, 1924 (Forty-third Statutes, page 461), notwithstanding that such matters may not be specifically mentioned in this enactment.

Sec. 6. All lands received by the Northern Pacific Railroad Company or its successors, the Northern Pacific Railway Company, under said grants or Acts of Congress supplemental or relating thereto which have not been earned, but which have been, for any reason, erroneously credited or patented to either of said companies, or its, or their, successors, shall be fully accounted for by said companies, either by restitution of the land itself, where the said lands have not passed into the hands of innocent purchasers for value, or otherwise, in accordance with the findings and decrees of the courts. In fixing the amount, if any, the said companies are entitled to receive on account of the retention by the

United States of indemnity lands within national forests and other Government reservations, as by this enactment provided, the court shall determine the full value of the interest which may be rightfully claimed by said companies, or either of them, in said lands under the terms of said grants, and shall determine what quantities in land or values said companies have received in excess of the full amounts they were entitled to receive, either as a result of breaches of the terms, conditions, or covenants, either expressed or implied, of said granting Acts by said companies, or either of them, or through mistake of law or fact, or through misapprehension as to the proper construction of said grants, or as a result of fraud, or otherwise, and said excess lands and values, if any, shall be charged against said companies in the judgments and decrees of said court. To carry out this enactment the court may render such judgments and decrees as law and equity may require

Sec. 7. The suit, or suits, herein authorized shall be brought in a district court of the United States for some district within the States of Wisconsin, Minnesota, North Dakota, Montana, Idaho, Washington, or Oregon, and may be consolidated with any other actions now pending between the same parties in the same court involding the subject matter, and any such court shall in any such suit have jurisdiction to hear and determine all matters and things submitted to it in pursuance of the provisions of this Act, and in any such suit brought by the Attorney General hereunder any persons having an interest in or lien upon any lands included in the lands claimed by the United States, or by said companies, or any interest in the proceeds or avails thereof may be made parties. On filing the complaint in such cause, writs of subpoena may be issued by the court against any parties defendant, which writs shall run into any districts and shall be served, as any other like process, by the respective marshals of such districts. The judgment, or judg-

ments, which may be rendered in said district court shall be subject to review on appeal by the United States circuit court of appeals for the circuit which includes the district in which the suit is brought, and the judgment, or judgments, of such United States circuit court of appeals shall be reviewable by the Supreme Court of the United States, as in other cases. Any case begun in accordance with this Act shall be expedited in every way, and be assigned for hearing at the earliest practicable day in any court in which it may be pending. Congress shall be given a reasonable time, which shall be fixed by the court, within which it may enact such legislation and appropriate such sums of money as may be necessary to meet the requirements of any final judgment resulting by reason of the litigation herein provided for.

Sec. 8. It shall be the duty of the Attorney General to report to the Congress of the United States any final determinations rendered in such suit or proceedings, and the Attorney General, the Secretary of the Interior, and the Secretary of Agriculture shall thereafter submit to Congress recommendations for the enactment of such legislation, if any, as may be deemed by them to be desirable in the interests of the United States in connection with the execution of said decree or otherwise.

Sec. 9. That the Secretary of the Interior is hereby directed to withhold his approval of the adjustment of the Northern Pacific land grants under the Act of July 2, 1864, and the joint resolution of May 31, 1870, and other Acts relating thereto; and he is also hereby directed to withhold the issuance of any further patents and muniments of title under said Act and the said resolution, or any legislative enactments supplemental thereto, or connected therewith, until the suit or suits contemplated by this Act shall have been finally determined: *Provided,* That this Act shall not prevent the adjudication of any claims arising under the public land laws where the claimants are not seeking title through the grants to

the Northern Pacific Railroad Company, or its successors, or any Acts in modification thereof or supplemental thereto.

Approved, June 25, 1929.

B

Act of May 22, 1936, 49 Stat. 1369:

[Chapter 444.] An Act to supplement the Act of June 25, 1929 (ch. 41, 46 Stat. L. 41), which authorized and directed the Attorney General to institute suit against the Northern Pacific Railway Company and others.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in the suit entitled United States of America, plaintiff, against Northern Pacific Railway Company and others, defendants, numbered E-4389, instituted and pending in the District Court of the United States for the Eastern District of Washington, under the authority and direction of the Act of June 25, 1929 (ch. 41, 46 Stat. L. 41), now on reference to a special master for hearing under an order of said court entered in said suit on April 21, 1936, a direct review by the Supreme Court of the United States by appeal may be had by any party to said suit of any order or decree of said district court entered upon a review of the report of the master to be made pursuant to said order of April 21, 1936, and also of the order or decree of said district court entered in said suit on October 3, 1935, as amended by an order of January 29, 1936. Such direct review by the Supreme Court of either or both of the said orders or decrees may be had by appeal taken within sixty days from the date of the order or decree of the district court entered upon a review of the report of the master to be made pursuant to the said order of April 21, 1936. The right of review of any final judgment, authorized by said Act of June 25, 1929, shall continue in force and effect.

Approved, May 22, 1936.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

No. 8893.

CHARLES E. SCHMIDT, ET AL., MINORITY STOCKHOLDERS OF THE NORTHERN PACIFIC RAILROAD COMPANY, INTERVENING PETITIONERS, APPELLANTS,

versus

THE UNITED STATES OF AMERICA, NORTHERN PACIFIC RAILWAY COMPANY, ET AL., APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

THOMAS BOYLAN,
Philadelphia, Pa.
ROBERT L. EDMISTON,
Spokane, Wash.
RAYMOND M. HUDSON,
MINOR HUDSON,
GEOFFREY CREYKE, JR.,
Washington, D. C.
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FOR THE NINTH CIRCUIT.

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CHARLES E. SCHMIDT, ET AL., MINORITY STOCKHOLDERS OF THE NORTHERN PACIFIC RAILROAD COMPANY, INTERVENING PETITIONERS, Appellants,

versus

THE UNITED STATES OF AMERICA, NORTHERN PACIFIC RAILWAY COMPANY, ET AL., Appellees.

Appeal from the District Court of the United States for the Eastern District of Washington, Northern Division.

Reply Brief for Appellants.

I.

FOREWORD.

The appellees in their brief are very strenuous in their efforts and labors to belittle and make fun of the appellants and their efforts and of the importance of the

issues involved, and to thereby drag a red herring across the trail to prevent the Court from understanding what the real questions are and the importance and significance thereof; counsel should rather endeavor to help the Court in solving the issues on this appeal.

The appellees' briefs bristle with quibbling and technicalities, and they seem still to be working in agreement or concert to prevent the Court from determining the questions mandatorily required by the Act of June 25, 1929, and the Government brief seems to carry the burden of such undertaking; this seems strange, as in the summer of 1936 one of the attorneys signing the Government's brief stated that the Government had no interest in the present fight and issues between the railroad and the railway, and that they would stand on the side lines and enjoy the fight without any participation therein.

Why the Government's sudden change? Probably because it realizes now that the Railroad Company by cross bill and answers and appellants Intervening Petition is seriously attacking claims and contentions of the United States which the railway company has not attached or resisted, as hereinafter set out, one among several being the charge that there was no foreclosure in 1875 or 1896, which leave the Railroad free to fix price of lands covered by the mortgage of 1870, which mortgage is still of record and unsatisfied (see first Proviso Joint Resolution of May 31, 1870, appellants' Brief Appendix, p. 62), and also the establishing that there was no foreclosure in 1896, which will require the United States to patent to the Railroad Company lands in place of all the lands patented to the Railway regardless of whether or not the Government can recover said lands from the Railway Company.

II.

AMENDMENT AT BAR.

Appellees are critical that there are statements in the appellants' brief that are not in the petition to intervene or answer and cross bill, and of which the Court may not

take judicial notice. The appellants now ask the Court for leave to amend the intervening petition and the answer and cross bill so as to make a part thereof every statement of fact set out in the appellants' brief and appendix that has not heretofore been set out in the said intervening petition and answer and cross bill, even though the same may be part of the record and of which also judicial notice may be taken in order that this Court may have the advantage of all the facts in its consideration of the questions involved; such an amendment in this Court is admissible under the decisions of the Supreme Court.

In *Jones* v. *Meehan,* 175 U. S. 49 at 60; 44 L. Ed. 1 at 29, the Court said: "*But as this court might, even now,* if justice appeared to require it, *allow an amendment* of the pleadings, this part of the case may be more satisfactorily disposed of by considering what the effect of those facts would have been, had they been duly pleaded. *Liverpool & G. W. Steam Co.* v. *Phenix Ins. Co.,* 129 U. S. 397, 447, 32 L. Ed. 788, 794, 9 Sup. Ct. Rep. 469; *Wiggins Ferry Co.* v. *Ohio & M. R. Co.,* 142 U. S. 396, 413, 414, 35 L. Ed. 1055, 1061, 12 Sup. Ct. Rep. 188."

III.
SCOPE OF APPEAL.

This appeal, which is from a decree striking out the intervening petition, which appellants had an absolute right to file, and, denying leave to file same, is considered as on a demurrer to the petition, which opens up the whole record.

The pending petition for an appeal of the railroad company by minority stockholders is from the order striking out its answer and cross bill and from other orders, and the Court, on considering same, can and should consider every question appearing in the record, and should consider and decide same on the appeal after granting it.

Dred Scott v. *Sanford,* 19 How. 393 at 427-8; 15 L. Ed. 691 at 710, after holding that the Court was without jurisdiction of the cause held that that Court could still, and that it should, and it actually did, decide other erroneous rulings in the cause and reversed same for such errors.

There are other decisions to the same effect. *Knotts* v. *First, &c., Co.*, 86 F. (2d) 551 (C. C. A. 4), *certiorari* denied, 81 L. Ed. 869, held that a Circuit Court of Appeals can consider other matters than those considered by the District Court.

This Court can and should, on decisions cited in the appellants' brief (pp. 148-9), decide all the assignments of error of the appellants seeking to reverse the rulings of the lower court on the exceptions to the master's report. When there is a decision of the questions of law on the master's report and there is nothing further left but a re-reference for a determination of the amount of damages, if any, recoverably under the law, there can be an appeal to this Court from the rulings on the questions of law thus decided without waiting for the report assessing the damages.

The Act of May 22, 1936 (49 Stats. 1369, page 7 of appendix to the Government's brief), does not make the appeal to the Supreme Court exclusive as contended by the railway brief (p. 16) under *Arkadelphia Mailing Co.* v. *St. Louis Southwestern Railway Co.*, 249 U. S. 134; 63 L. Ed. 517. That case held, as it was required specifically by the statute to do, that the direct appeal to the Supreme Court was exclusive, for it was an interstate commerce rate case under Judicial Code, Section 238, which is U. S. C. A. Title 28, Section 345, and appeals in such suits by U. S. C. A. Title 28, Section 225, are specifically excluded from this Court. The Act of May 22, 1936, does not exclude an appeal to this Court, and, therefore, one statute making the direct appeal exclusive and the other statute not making the direct appeal exclusive, the appeal to this Court is permissible under the old principle that "naming one excludes the other".

At one time the appellees contended that *Century Indemnity Co.* v. *Nelson*, 303 U. S. 213; 82 L. Ed. 535, reversing 90 F. (2d) 644 (C. A. A. 9), keeps alive the right of the appellees for the direct appeal to the Supreme Court under the Act of May 22, 1936, but from a careful reading of the

statute and the decision one will see instantly that the decision does not have such effect. The Act of May 22, 1936, specifically says that the appeal from the first report must be within 60 days from the ruling on the second report. There is nothing said about the "progress of the trial" as in the California statute—the two statutes are entirely different—and it was an action at law and not a suit in equity.

IV.
MISCELLANEOUS.

The Court in *Bardon* v. *Northern Pacific Railroad Company,* 154 U. S. 324; 38 L. Ed. at 1001 (5/26/94), clearly construed the Joint Resolution of May 31, 1870, to permit only one mortgage, for the Court said: "Some effect is also sought to be given to the fact that Congress authorized the Northern Pacific Railroad Company to place a mortgage upon its entire property. Admitting that such is the fact, the conclusion claimed does not follow. *Congress thereby only authorized a mortgage upon the property granted to the company,* which was the lands without minerals." All italics in this brief are supplied.

Kelly v. *Ex rel Foss Company,* 302 U. S. 1, 82 L. Ed. 39, following *Gibbons* v. *Ogden,* 9 Wheat. 1; 6 L. Ed. 23, 73, held that where *state* legislation is in conflict with *Federal* legislation, the *state* legislation *must fall.*

Under *Windsor* v. *McVeigh,* 93 U. S. 474; 23 L. Ed. 914, as quoted in *United States* v. *Turner,* 47 F. (2d) at 89 (C. C. A. 8), the approximately $81,000,000 deficiency judgment against the Northern Pacific Railroad Company is void, as it states "a judgment is *void,* not just voidable, where, although the Court had jurisdiction of the subject matter as well as the parties, it had exceeded its powers".

The Commissioner certainly thought that all the questions raised by the appellants should be decided, because he stated in his first report (R., 453) and quoted in his second report (R., 709) as follows: "*Every question from the organization of the company* to the date of the Act that *had been, or that now might be, raised, should be presented to the Court and finally determined.*"

V.

REPLY TO RAILWAY BRIEF.

The railway, as well as the Government, futilely seeks to endeavor to legislate by construction the Act of June 25, 1929, and May 22, 1936, and other acts, so as to cut out and leave meaningless clauses of Section 5 of the 1929 Act and leave out words or read in other words in other portions of the Acts. This Court stated the rule in *United States* v. *Pan American Petroleum Company,* 55 F. (2d) 753 at 771 (C. C. A. 9), by quoting Butler, J., in *United States* v. *Mammoth Petroleum Company,* 278 U. S. at 278; 73 L. Ed. 322, that "construction may not be substituted for legislation".

Mr. Justice Harlan in *Sioux City & St. Paul Railroad Co.* v. *United States,* 159 U. S. 349, 360; 40 L. Ed. 177, 181, quoted from *Lau Ow Bew* v. *United States,* 144 U. S. 47, 59; 36 L. Ed. 340, that "nothing is better settled than that *statutes should receive a sensible construction* such as *will effectuate the legislative intention* and if possible, so as to *avoid an unjust and absurd conclusion*".

The railway's statement (p. 22) that the praecipe for the record on appeal was not served, is incorrect as a praecipe, assignments of error and statement of jurisdiction were served April 23, 1938, when the appeal was granted from the District Court to the Supreme Court, which was later annulled, when the record was made for the appeal to the Supreme Court of the United States, which was the same record; this record was presented to Judge Wilbur of this Court.

And on June 7 and 8, 1938, all appellees were duly notified in writing that the same identical record and praecipe which had been presented to the U. S. Supreme Court had been presented to Judge Wilbur on the petition for this appeal, and appellees filed briefs without objection to the record or praecipe.

On July 30, 1938 (R., 1286), the praecipe for the record in this case was served on each appellee after the Clerk of this Court sent the record, on which Judge Wilbur had granted the appeal on July 5, 1938, to the Clerk of the lower

court for certification on appeal. On August 4, 1938, the Clerk of the District Court certified the record (R., 1235, 1239).

The case cited (Ry. Br., p. 22) *Railroad Company* v. *Schutte,* 100 U. S. 647, simply held that where part of the record was sent up the appellant must supply the remaining portion required by the appellee or be subject to dismissal.

After due service of the praecipe showing the record in the case at bar, no objection was made or direction given requiring other documents by the appellees until the filing of their brief. They do not now indicate any documents were omitted.

Meyer v. *Implement Company,* 85 F. 874 (C. C. A. 5) (Ry. Br., p. 24), is not applicable, as it was plain from the certificate of the Clerk that only part of the record was sent up, that the appellant's counsel did not file a praecipe. Consequently, there was not a *prima facie* lawful record, but had there been a *prima facie* legal record, as in the case at bar, the only resort would be a writ of *certiorari* for the balance of the record.

Dixon v. *Brown,* 9 F. (2d) 63 (C. C. A. 5) (Ry. Br., p. 26), is not applicable as the transcript certified by the Clerk was not filed in the Circuit Court of Appeals, but only certified portions of the record that was printed in the lower court were filed.

Chandler & Price Co. v. *Brandtjen, Inc.,* 296 U. S. 53, 80 L. Ed. 39 (Ry. Br., p. 29; U. S. Br., pp. 25, 49), is not applicable as it was an application to intervene, which was not of right, like the case at bar, but was only discretionary with the Court under certain circumstances. Appellees seem to lose sight of the fact that in the case at bar the statute specifically gave the right to intervene or to be heard as an absolute right, and required the Court to determine all the facts and law on all issues that are set up in the intervening petition and cross bill and answer.

In *King* v. *Barr,* 262 Fed. 56 (C. C. A. 9) (Ry. Br., p. 30), the intervention was not sought until *six months* after

a *final decree,* and challenged the validity of the entire proceedings, and the petitioner and his counsel had known for two years of the proceedings and had no excuse for not acting sooner. This was a *discretionary* and *not* as of *right* intervention.

Appellants are not challenging the validity of the entire proceedings here, but asking the Court to require the plaintiff to correct the bill to make it conform to the mandate of the statute and to have every question provided for by the statute heard and determined.

Congress demanded a finding of fact, but the lower court refused to comply.

In *Whitaker* v. *Britson Manufacturing Company,* 43 F. (2d) 485 (C. C. A. 8) (Ry. Br., p. 30), there were two suits with two intervention petitions, one to vacate a judgment for $51,000 and the other to vacate bankruptcy proceedings on the said judgment, and as it was not an intervention of right, but only discretionary, the Court held that as the petitioner *attacked* the *whole proceedings* in both cases as *void,* he could not intervene. The Court gave permission to bring independent suits to vacate the judgment as well as the bankruptcy proceedings.

The Court held in *Board of Grain Commissioners* v. *Lafayette Bank,* 27 F. (2d) 286 (C. C. A. 4) (Ry. Br., p. 31), that the intervening petitioner was a stranger to the proceedings and as there was *no consent* and *no statute* providing for the intervention, it was *discretionary* with the District Court.

Rodman v. *Richfield Oil Company,* 66 F. (2d) 244 (C. C. A. 9) (Ry. Br., p. 33), only held that one bondholder was not entitled to intervene to foreclose a mortgage where proper demand had not been made on the trustee to act and the trustee had not taken any action.

In *Palmer* v. *Bankers Trust Company,* 12 F. (2d) 447 (C. C. A. 8) (Ry. Br., p. 33), the intervening petitioner had bought the bonds after the suit started for the purpose of speculation, and it was simply a discretionary intervention.

The Court said: "The general rule in such cases is that the trustee, being a party to the suit, represents all the bondholders, and that the latter will not be permitted to intervene unless a showing is made that the trustee is not unexceptionable; for example, that the trustee has or is representing a financial interest in the litigation opposed to that of the bondholders, that the trustee is guilty of fraud or is not acting in good faith. *Shaw* v. *Railroad Co.,* 100 U. S. 605, 611, 612, 25 L. Ed. 757; *Richter* v. *Jerome,* 123 U. S. 233, 246, 8 S. Ct. 106, 31 L. Ed. 132; *Skiddy* v. *Railroad Co.,* Fed. Cas. No. 12,922, pages 286, 287; *Farmers' Loan & Trust Co.* v. *Kansas City, etc., R. Co.,* (C. C.) 53 F. 182; *Clyde* v. *Railroad Company* (C. C.), 55 F. 445, 448; *Bowling Green Co.* v. *Virginia Co.,* (C. C.) 132 F. 921, 924; *Continental, etc., Bank* v. *Allis-Chambers Co.,* (D. C.) 200 F. 600, 609."

Lewis v. *B. & O.,* 62 F. 218 (C. C. A. 4) (Ry. Br., p. 33), was a mandamus for an appeal from a denial of a motion to consolidate and intervene by one who was not a necessary party to the suit, and, the Court said, possibly not a proper party, and it was a discretionary intervening petition.

Appellees seek to interpose laches (Ry. Br., p. 34, U. S. Br., p. 50). Appellants' brief (pp. 47-54) shows clearly that the statute prevents the defense of laches, and if it did not, the facts alleged with the ones tendered in the amendment at bar clearly overcome laches.

The Commissioner, in his second report, seemed clearly to have adopted this view, for he said (R., 799): "In any event, the Act of June 25, 1929, directs this court to review the administration of the Northern Pacific grants from the beginning, requiring it to correct any errors. *Now to say* that the *review cannot be had* because *of lapse of time is to argue* that the *statute should not be obeyed.*"

Again (R., 801): "And it is a little short of a travesty upon that statute (June 25, 1929) to declare that justice cannot be done in this particular instance because, as is supposed, the company did not act promptly."

Congress moves slowly, as it has a right to do, as well as it has the power to amend the Act of 1864 and the Joint Resolution of 1870 and to revoke all remedies and create and establish others, and to take its time about doing so, and this is shown by the Act of July 1, 1898, the non-actions on

the Resolutions of 1907 and 1908 (appellants' brief, appendix, pp. 11, 14) and other resolutions and bills.

Laches is remedial—Congress can and did eliminate laches—and can change statutes of limitations. The Act of 1898 gave notice to the Government and railway company and railroad company that the question of title to the property must some time—not fixing the time—be settled; Congress, as it has the right and power, takes its time for such determination, and it did this by the Act of June 25, 1929. Appellants' Brief (p. 41) sets out, and it will be alleged in the amendment that this Court has been asked to allow, that the Government's attorneys led the appellants to believe until 1936 or later that all their rights and all the controversies between the railway company and the railroad company would be heard and determined in the present suit. After the Government attorneys had used the appellants and their associates for all that they felt they needed them or could use them, they then threw them out and began to laugh at them.

The Government's Brief (pp. 29, 30, 31 and 32) makes desperate efforts to show that Mr. McGowan did not think that this suit should settle the disputes between the railroad and railway, and that the committee did not think so and did not so intend, but the quotations they made from the hearings are very short, and if they had fully quoted Mr. McGowan and others, the Court would see that the committee did not write the bill the way that McGowan and the Attorney-General may have wanted it.

We are filing in the appendix further and full quotations from the Joint Congressional Committee hearings, pages 4648 to 4653 and pages 5247 to 5248.

They laid great stress on the so-called Forest Reserve case, *United States* v. *Northern Pacific,* 256 U. S. 51; 65 L. Ed. 825, and quoted the statement of the Supreme Court. The wording of the statute makes it clear that Congress did not accept the statement of the Supreme Court as to the rights of the railroad and railway company and specifically required the determination of such rights.

Congress then knew, as this Court now knows (Appellants' Brief, p. 32), that in the Forest Reserve case there was at least a tacit agreement between the Government and the railway company by the pleadings, as there is in this case, that the railroad company had no further rights, as the Government alleged that all the rights of the railroad had passed to the railway, and the railway company admitted the same. As the railroad company was not a party to the suit, any statement of the Supreme Court would be merely *obiter dictum,* and the Court could not on the record have decided the rights of the two companies, as there was nothing in issue between them, and the Railroad was not a party to the suit.

The railway company may be the *successor in physical possession* and operation of the lands and property of the railroad company, but it is not the successor in title or ownership, and it has never been shown or decided that the railway company was the successor in ownership and title of the railroad properties and lands.

Attorney-General Harman, 21 Opin. 486 (2/6/97); (J. C. C. 2700), assumed without proof and said that the railway company "has entered into possession and claims ownership" of the railroad property; he only assumed that there was a sale, there was no evidence and he did not decide it. He only stated that the security holders having failed to obtain a Federal charter under Senate Resolution 24 used a state charter.

Attorney-General Moody, 25 Opin. 401 (4/12/05); (J. C. C. 286), uses almost identical language as Harman, as Moody stated that the railway "has entered into possession and has never since claimed ownership" of the railroad properties. Moody held that there was a foreclosure in 1875, which the railway, as well as the railroad, now denies, and he also assumed that there was one in 1896, as he thought that jurisdiction was shown on the record, but he was in error as to this as the record affirmatively shows there was no land or property of Railroad Co. in the Eastern District of Wisconsin.

The Act of July 1, 1898, granted certain indemnity to the railroad company, "or its *lawful successors*", and in the proviso refused to accept the Railway as such "lawful successors", and in *Humbird* v. *Avery,* 195 U. S. 480; 49 L. Ed. 286 (12/12/04), which set out in full and construed the Act, said that "the Northern Pacific Railroad Company made conveyances with warranty to the plaintiffs, Humbird and Weyerhauser, of all the lands, aggregating more than 10,000 acres, the title to which is here in dispute", after July 1, 1898.

If the Railway had title and was the "lawful successor" of the Railroad, why did not the Railway make the deed instead of the Railroad? The Railway also seems to have also conveyed same land to the plaintiff.

It seems quite evident from decisions and the fact that the plaintiffs were represented by the Railway's General Counsel and attorney.

The Court referred to the Railway Company as the "*alleged successors* in interest of the Northern Pacific R. R. Co." Hannon's opinion above was February 6, 1897, more than a year before the Act, and this decision was in December 12, 1904.

The United States intervened in this suit.

In *Levy* v. *Equitable Trust Company,* 271 F. 49 (C. C. A. 8) (Ry. Br., p. 34), the petition to intervene was a discretionary case and not an absolute right. The company was represented by independent counsel, for the Court said: "As regard the condition above mentioned, they failed wholly and completely. On the contrary, it appears that the case for the Denver in the court in New York and on appeal to the Circuit Court of Appeals was in charge of independent counsel of great ability and reputation, not affected by the influences alleged to have controlled the prior corporate actions of the Denver. The reported opinions of those courts show that almost every conceivable defense to the demand of the Trust Company was urged, other than that now asserted by the petitioners, the proof as to which we have already considered."

Merriam v. *Bryan,* 36 F. (2d) 578 (C. C. A. 9) (U. S. Br. p. 51), was an application after the trial on the merits

at which the petitioner was a witness, and it was a case of a discretionary and not an absolute right. The petitioner was further protected by a corporate litigant. There was no offer of an excuse for the three years' delay.

In *Northern Pacific* v. *Boyd,* 228 U. S. 482-515, 57 L. Ed. 931, 944 (4/28/13), the Court said: "But the doctrine of estoppel by laches is not one which can be measured out in days and months, as though it were a statute of limitations. For what might be inexcusable delay in one case would not be inconsistent with diligence in another, and unless the non-action of the complainant operated to damage the defendant, or to induce it to change its position, *there is no necessary estoppel arising from the mere lapse of time. Townsend* v. *Vanderwerker,* 160 U. S. 186, 40 L. Ed. 388, 16 Sup. Ct. Rep. 258.

"In this case the defendants and their *stockholders have not been injured by Boyd's failure to sue.* His delay was not the result of inexcusable neglect, but in spite of diligent effort to put himself in the position of a judgment creditor of the Coeur D'Alene so as to be able to proceed in equity to collect his debt. He accomplished this result only after protracted litigation, beginning in 1887 and continuing through the present appeal (1913). * * *

"The *delay* in beginning the present suit—the last of a remarkable series of legal proceedings—*was excusable if not absolutely unavoidable.* Boyd claims that he had no notice of the fact that the stockholders were to retain an interest in the new company, and that, in part, the delay to begin proceedings was occasioned by the railway company itself; since it, as the purchaser of the Coeur D'Alene property, resisted his attempt to revive the judgment. Boyd's silence, in 1896, did not mislead the stockholders, nor did his non-action induce them to become parties to the reorganization plan. They have not in any way changed their position by reason of anything he did or failed to do, and the mere lapse of time under the peculiar and extraordinary circumstances of this case did not estop him, when he revived the judgment, from promptly proceeding to subject the shareholders' interest in property, which, in equity, was liable for the payment of his debt. The decree of the Circuit Court of Appeals is affirmed."

Young v. *Southern Pacific Co.,* 34 F. (2d) 135 (C. C. A. 5) (Ry. Br., p. 36), is not applicable, as the Court stated there was nothing in the bill to show the appellants' con-

nection with the Bogert case, whereas appellants here have shown connection with the whole matter from the beginning, connection and interest in, and support of the Hoover suit, and, as stated in the Boyd case, there has been no injury to the railway company. The railway company's attitude in this suit is, as it has always been, an utter disregard of and deliberate determination, arbitrarily and willfully, to ignore and belittle the rights of all other parties and refuse and evade any discussion of such rights.

VI.

REPLY TO UNITED STATES BRIEF.

The allegations in the record and appellants' brief referred to in the United States brief, page 4, are of vital interest to the Court, as part of the history of the transactions and counsel are only critical because they do not want the Court to know and understand all the transactions and the real situation. They have endeavored to befuddle the issue by such and other criticism, and their quibbling in Note 1 on page 4. The petition to Judge Webster (R., 1246) states that "on March 9, 1938, an order was entered denying (*among other things*) the motions, etc.", but did not set out all the matters in the decree. Yet all the decrees were named and referred to by dates, and the prayer was that "they may be allowed to appeal from each of said orders or decrees in the said cause", clearly being an appeal from all of each decree; in fact, appeals cannot be from part of a decree, but must be from an entire decree.

It seems surprising that the Government attorneys would undertake to ignore various provisions of a statute as they do in U. S. brief (pp. 9, 10). The clauses they mention do not bear out their contention, and under their contention the last clause of Section 5 is meaningless; it is as follows: "And all other questions of law and fact presented to the Joint Congressional Committee appointed under authority of the Joint Resolution of Congress of June 5, 1924 (43 Stats. 461), notwithstanding that such matters may *not be specifically* mentioned in this enactment."

It is true that the Attorney-General and Mr. McGowan did not include such a provision in the bill they drew for

the committee, and counsel may claim that thereby the Attorney-General is not bound by the bill, notwithstanding that the committee and Congress overruled him and inserted such a clause.

When the committee reported and Congress passed the Act of 1929, it had in mind the ruling of the Court in *U. S.* v. *Union Pacific,* 98 U. S. 569, 608; 25 L. Ed. 143 (U. S. Br., p. 35) (1/6/79), and specifically overruled it or met and changed the Court's holding by adding this paragraph and other paragraphs more specific.

The Government admits foreclosures of the mortgages of the railroad, but the Court will remember that both the answer and the cross bill and the intervening petition deny that there was any foreclosure in 1875 or 1896.

U. S. Brief (p. 13) states that the so-called disclaimer of the railroad company (R., 417) was stricken out, but there is no decree, order or intimation in the record that it was ever stricken out.

The Government says (p. 13) that the Commissioner pointed out "that it was not sought by the Government to set aside the sales" by foreclosure (R., 645). The Government attorneys do not want the foreclosure sale set aside, but Congress ordered that the Court determine and declare their validity or invalidity, and if the Court declared them invalid, they would have to set them aside. Congress likewise removed any so-called estoppel that the Government seems to wish to have applied to it. Is this why the Government is supporting the claims and efforts of the railway to defeat the railroad and appellants?

In note 5, page 17 (U. S. Brief), counsel again attempt to belittle and brush aside the issues, and they claim multifariousness, but the Act of 1929 removed the defense of multifariousness.

In the summary of the petition (U. S. Br., p. 18) counsel seem unfamiliar with the allegations of the petition, and are endeavoring to give the impression that the petition alleged that the mortgages were foreclosed. The petition specifically states that there were no foreclosures, but only

an exchange of securities. This summary omits to state that the United States was not a party to the proceedings in 1875 and 1896.

RAILWAY NOT PROPERLY DEFENDING.

Appellees' contention (U. S. Br., p. 20) that there is no allegation that the railway company is not adequately presenting the case against the United States is incorrect, as it is necessary to deny that there was any foreclosure in 1875 and 1896, which the railway company has not done. Besides, the seeming working agreement between the railway company and the Government in this suit to avoid such decision on the mortgages and to deny all rights of the railroad company is prejudicial to its claims against the Government.

The denial of and proof by the appellants that there was no foreclosure in 1875 leaves the railroad free to fix the price of lands covered by the mortgage of July 1, 1870, which mortgage is still of record and unsatisfied, and the railway's failure to assert these matters for the railroad is prejudicial to the railroad.

Furthermore, the appellants by establishing, as they have, that there was no foreclosure in 1896, can require the United States to patent to the railroad company lands in the place of all the lands patented to the railway company regardless of whether or not the Government can recover from the railway company said lands or the value thereof so patented to the railway company. The Railway not only has utterly failed in this respect to protect the Railroad Co., but, on the contrary, is seeking to injure and prejudice these rights of the railroad company.

Counsel cannot find where and when, if at all, the Railway has presented for the railroad the unanswerable argument that the Act of July 1, 1898, construed and/or defined the Act of 1864 and the Joint Resolution of 1870 to provide that the Railroad can make indemnity selections for loss in one or other state from lands "situated within *any state* or *territory* into which such railroad grant extends".

Such omission is another injury to the Railroad Company's rights inflicted by the Railway Co.

There are other commissions and omissions of the railway prejudicial to the railroad's rights against the Government shown by the records and briefs, in addition to the agreement for the amendment of the bill on August 1, 1938, and the failure and refusal of the railway company to permit the railroad company to appeal from the decree of March 22, 1938, which reviewed and passed upon the exceptions to the master's second report and in endeavoring to thwart the minority stockholders' appeal from same, both in the Supreme Court of the United States and in this Court.

Baker v. *Spokane Savings Bank,* 71 F. (2d) 487 (C. C. A. 9) (U. S. Br., p. 36), denied the intervening petition in a discretionary and not an absolute right case, but made the intervening petitioner a plaintiff, though the allegations of the petition were uncertain, and the Court stated: "It is not clear from the allegations of the petition in intervention how the interveners became depositors, whether by depositing money after the transfer of the assets of the society above mentioned, or whether they became creditors by virtue of the terms of the exchange. The trial court denied the motion for leave to intervene, but granted leave to the petitioners to join in the complaint as parties plaintiff."

Yet *Ex Parte Cutting,* 94 U. S. 14; 24 L. Ed. 49 (U. S. Br., p. 23), held that in a discretionary intervention if the petitioner is treated as a party by the lower court, he can appeal, and the Court stated: "From this it is apparent that if one wishes to intervene and become a party to a suit in which he is interested, he must not only petition the court to that effect, but his petition must be granted: and while it is not necessary for him to show that he has actually been admitted by an express order entered upon the record, he must at least make it appear that he has acted or has been treated as a party. That, as we have seen, is not the case here. These petitioners seem to have been content to leave their interests in the hands of Akers; and when he went out they went with him. That the court understood this to be so is apparent from the following statement made by the judges in their return to the rule to show

cause: 'On June 6, 1876, said Akers and said St. Louis County withdrew their answers and dismissed their cross bills, both said Akers and said St. Louis County purporting to act for themselves as stockholders, and for all other stockholders who might join them.'

"Upon this state of facts it is impossible to say that the petitioners, or any of them, have established their right to appeal as actual parties to the suit before the decree."

* * * * * * *

"We need not consider what rights these petitioners would have if Akers had not withdrawn his intervention before the decree. After his withdrawal, they had no representative stockholder party to the suit, and their position is the same it would have been if no parties had ever intervened in their interest."

In the case at bar some of the motions of appellants were denied on the merits and not stricken, thus treating them as parties, but denying them full rights as parties, which is reversible error; but this is not a waiver of appellants' contentions that they are entitled as an absolute right to intervene and to appeal.

Aiken v. *Cornell,* 90 F. (2d) 567 (C. C. A. 5) (U. S. Br., pp. 24 and 49), held that it was in the Court's discretion to deny intervention where there was not then a fund *because it was not a class suit.* There was *no statute* in that case, and it was not an absolute right case.

The statement (U. S. Br., pp. 24, 45 and 46) that appellants could bring an independent suit like the Hoover suit, and there is not a decision holding that the United States would be a necessary and indispensable party is incorrect, as, in addition to the cases cited in appellants' brief, there are many decisions of this Court and others that the United States is a necessary and indispensable party to a suit determining the rights between the railroad and railway companies.

On December 12, 1904, long after 1896, in *Humbird* v. *Avery,* 195 U. S. at 509; 49 L. Ed. at 299, in discussing the U. P. R. R. grant, Chief Justice Fuller said: "The selection not having been approved by the Secretary, the title remains in the Government."

Wilson v. *Elk Coal Company,* 7 F. (2d) 112 (C. C. A. 9) (*certiorari* denied, 269 U. S. 578; 70 L. Ed. 426), held that litigants cannot litigate between themselves ownership or equities in property or land so long as the United States held title thereto and was not a party to such suit, as the United States is a necessary party to same. This decision was approved and followed in *Proctor* v. *Painter,* 15 F. (2d) 974 (C. C. A. 9), and in *American Sodium Company* v. *Shelby,* 51 N. W. 355, 276 Pac. 11 at 13. Also in *Washington* v. *United States,* 87 F. (2d) 421 at 429 (C. C. A. 9).

In *Bourdieu* v. *Pacific Western Oil Co.,* 80 F. (2d) 774 at 778 (C. C. A. 9), the Court held and said: "The United States was not made a party to this suit, and it is conceded that the United States is the owner of the oil and gas deposits. It is shown that two of the appellees are lessees of the Government, and by reason thereof have a permissive right to remove the oil and gas deposits. It is apparent, therefore, that neither the court below nor this court has jurisdiction of the subject-matter of the suit, and, therefore, the motion to dismiss made by appellees in the court below should have been sustained.

"In *Bockfinger* v. *Foster,* 190 U. S. 116, 126, 23 S. Ct. 836, 840; 47 L. Ed. 975, it was said concerning *Wilcox* v. *Jackson,* 13 Pet. 498, 10 L. Ed. 264, and *United States* v. *Schurz,* 102 U. S. 378, 402, 26 L. Ed. 167, 173: 'But those cases equally recognize the principle that the courts will not interfere with the Land Department in its control and disposal of the public lands, under the legislation of Congress, so long as the title in any essential sense remains in the United States.'

"In *Wilson* v. *Elk Coal Co.,* 7 F. (2d) 112, 113, *certiorari* denied, 269 U. S. 587, 46 S. Ct. 203, 70 L. Ed. 426), this court, in a contest involving a preference right in coal lands, said: 'It may be that the appellant had, and still has, a remedy by mandamus against the proper officer of the United States, to compel the issuance of a patent. * * * But, be that as it may, we are clearly of opinion that the courts are without jurisdiction to grant relief in favor of one claiming only an equitable title, as against a party in possession under a lease from the United States, so long as the title remains in the United States.'

"That case was followed by us in *Proctor* v. *Painter,* 15 F. (2d) 974."

In *Skeen* v. *Lynch,* 48 F. (2d) 1044 (C. C. A. 10) (*certiorari* denied, 284 U. S. 633; 76 L. Ed. 539), the Court held that where patent conveying stock-raising lands reserved coal and other minerals, and patentee sought to quiet title to oil and gas as against Government's prospecting permittees, United States held indispensable party (43 U. S. C. A., Sec. 299).

In *Witbeck* v. *Hardeman,* 51 F. (2d) 450 at 454 (C. C. A. 5), Hutcheson, Circuit Judge (concurring) said: "Witbeck had nothing which the court can make him assign, Hardeman claiming not under but adversely to the Witbeck permit. *Wilson* v. *Elk Coal Co.,* (C. C. A.) 7 F. (2d) 112."

In reference to the cases cited (U. S. Br. pp. 47-8), it is a well recognized rule that after a patent is issued and title passed, the United States is not a necessary party to suit over the land involved.

In some of the suits the parties were just trespassers, and in *Barden* v. *Northern Pacific,* 154 U. S. 289; 38 L. Ed. 992 (5/26/94), the United States was brought in by the intervening petition as a necessary party and participated in the suit, and the same is true of *Northern Pacific Railway Company* v. *Sodeberg,* 188 U. S. 526, 47 L. Ed. 575 (2/23/03), but because the United States, even though it was a necessary party, was, by an oversight, not made a party to any of the suits named, does not make those decisions a precedent binding on the courts in other cases.

Bache v. *Hine,* 6 F. (2d) 508 (C. C. A.), was a discretionary intervention, and not, as here, an absolute right to intervene.

VII.

RIGHTS OF MINORITY STOCKHOLDERS TO FILE CROSS BILL OR INTERVENING PETITION.

Davenport v. *Dows,* 85 U. S. 626; 21 L. Ed. 938, a leading case, held that in a class suit by minority stockholders the corporation is a necessary party.

In *Dodge* v. *Woolsey,* 18 How. at 341; 15 L. Ed. at 405, it was held that minority stockholders could enjoin the payment of a tax in violation of the charter contract, and the Court said: "It is now no longer doubted, either in England or the United States, that courts of equity in both have a jurisdiction over corporations, at the instance of one or more of their members; to apply preventive remedies by injunction, to *restrain* those who administer them from doing *acts* which would *amount* to a *violation* of *charter,* or to *prevent* any *misapplication* of their *capitals* or profits, which might result in lessening the dividends of stockholders, or the value of their shares, as either may be protected by the franchises of a corporation, if the acts intended to be done create what is in the law denominated a breach of trust. And the jurisdiction extends to inquire into, and to enjoin, as the case may require that to be done, any proceedings by individuals, in whatever character they may profess to act, if the subject of complaint is an imputed *violation of a corporate franchise,* or the denial of a right growing out of it, for which there is not an adequate remedy at law."

Doctor v. *Harrington,* 196 U. S. 576; 49 L. Ed. 606 at 609-10, held that where minority stockholders brought a suit to enforce the rights of the corporation, that the *corporation* was *not necessarily,* in legal effect, *required* to *be a plaintiff, but may be a defendant.* In this case if the corporation had been made a plaintiff, it would have ousted the United States Court of jurisdiction because of citizenship.

See appendix for statement of or quotations from *National Power and Paper Co.* case, 122 Minn. 355; 142 N. W. 820; *Morgan's Louisiana & Texas R. & S. Co.* v. *Texas Central R. Co.,* 137 U. S. 171; 34 L. Ed. 625; *Neal* v. *Foster,* 34 Fed. 496; *Guarantee Trust & Safe Deposit Co.* v. *Duluth & W. R. Co.,* 70 Fed. 803; Corpus Juris. 503; *Hough* v. *Watson,* 91 W. Va. 161, 112 S. E. 303; *Ogden* v. *Gilt Edge Consol. Mines Co.,* 225 Fed. 723; *Ulman* v. *Iager,* 155 Fed. 1011; *Fitzwater* v. *National Bank of Seneca,* 62 Kan. 163; 61 Pac. 684; and *Secor* v. *Singleton,* 41 Fed. 727.

VIII.

ASSIGNMENT OF ERROR XXVIII.

This assignment of error (R., 1231) goes to the railroad exception 1 to the second report (R., 887) involving the deduction of 347,141.24 acres from the railroad company on account of the Portage, Winnebago & Superior Railroad Co.

This question was partially discussed in appellants' brief (p. 144), under Assignment of Error VII and the ruling of Secretary Smith in 21 L. D. 412, is conclusive and the same having stood since prior to 1896 is binding on the Court under decisions later cited herein.

Secretary Smith restated and reaffirmed what the Commission concede (R., 531) was the long established construction and administration of the Northern Pacific grants by the Secretary and the Land Office, but he says as the same construction and practice had not been established as to other grants, no two grants are similar in terms—the construction is "so clearly wrong that it ought not to be followed".

This established rule of construction and administration of the Act of 1864 and Joint Resolution of 1870 was accepted and adopted by Congress as in the Amendatory Act of July 1, 1898, it was not changed, and is binding and conclusive in the courts. Counsel fails to find that this argument was presented to the Court or Commissioner on behalf of the Railroad Company—its omission was prejudicial to the Railroad Company.

In *United States* v. *Hermanos,* 209 U. S. 338, 52 L. Ed. 821, the Court said: "And we have decided that the *re-enactment* by Congress, *without change,* of a *statute* which had *previously* received long-continued *executive construction,* is an *adoption by Congress of such construction. United States* v. *G. Falk & Bro.,* 204 U. S. 143, 152, 51 L. Ed. 411, 414, 27 Sup. Ct. Rep. 191."

In *Bardwell* v. *Petty,* 52 App. D. C. 310, at 311, 286 Fed. 772, the Court held and said: "Moreover, on June 30, 1902 (32 Stat. 547), the Congress, which is presumed to know the judicial interpretation put upon its legislation, deliberately amended its Act of June 19, 1878, but

did not amend away or modify in any particular the judicial interpretation given to the earlier act in *Murphy* v. *Preston, supra.* Congress having the opportunity to meet the decision of the Court in *Murphy* v. *Preston,* and having declined to do so, we must assume that that decision met with legislative approval."

"Legislation once judicially, or even administratively, interpreted, if left for a long period of time unchanged, unmodified, or unamended, may well justify the conclusion that the judicial or administrative interpretation was in accord, and not at variance, with the legislative intention. *Stuart* v. *Laird,* 5 U. S. (1 Cranch) 298, 308, 2 L. Ed. 115; *United States* v. *Midwest Oil Co.,* 236 U. S. 469, 473, 35 Sup. Ct. 309, 59 L. Ed. 641; *United States* v. *Baruch,* 223 U. S. 191, 200, 32 Sup. Ct. 306, 56 L. Ed. 399; *Edwards* v. *Darby,* 25 U. S. (12 Wheat.) 206, 209, 6 L. Ed. 603; *Hahn* v. *United States,* 107 U. S. 402, 406, 2 Sup. Ct. 494, 27 L. Ed. 527; *United States* v. *Philbrick,* 120 U. S. 52, 59, 7 Sup. Ct. 413, 30 L. Ed. 559; *Robertson* v. *Downing,* 127 U. S. 607, 613, 8 Sup. Ct. 1328, 32 L. Ed. 269; *United States* v. *Healey,* 160 U. S. 136, 141, 16 Sup. Ct. 247, 40 L. Ed. 369; *United States* v. *Hermanos,* 209 U. S. 337, 339, 28 Sup. Ct. 532, 52 L. Ed. 821; *Komada* v. *United States,* 215 U. S. 392, 396, 30 Sup. Ct. 136, 54 L. Ed. 249.

"The construction given to the act of 1878 in *Murphy* v. *Preston,* standing as it has for so many years unmodified and unreversed, should not be changed at this late day, and must be considered as *stare decisis.* To hold otherwise would leave little or no application for a very sound, wise, and meritorious legal principle designed to settle definitely questions of law, and to protect the rights of citizens who, in the acquisition of property and the assumption of responsibilities, have accommodated themselves to the law as interpreted."

IX.

ASSIGNMENT OF ERROR XXIX.

This assignment of error (R., 1232) was to the action of the Court in overruling the second exception of the railroad company (R., 888) involving the rights of the railroad to 637,580.89 acres in the *Tacoma Overlap.* The Commissioner (R., 857) says: "So I feel bound to come to a decision upon principle, as I find no authorities which serve as a precedent nor other clue. We are left

without any aid except the language employed and, after all, the old-time rule of taking the language as it stands and interpreting it is the safest guide."

Then the Commissioner, and he was followed therein by the lower Court, proceeded and sought to "Legislate by Construction" and thereby change the statute. See *U. S.* v. *Mammoth Petroleum Co.,* above.

The Commissioner's construction is very strained and his citations do not sustain him.

Under the Act of 1864 and Joint Resolution of 1870, where the words are given their usual and accepted meaning, it is manifest that the lands within the Tacoma Overlap were lost to the grant and the Railroad Co. is entitled to the indemnity claimed. This is the principle of the Forest Reserve case above: while the Commissioner states there was no final judgment in that case, yet the Court on reversing gave the litigants an option, and in event of its not being accepted, stated what the rights of the railroad company were.

The Commissioner criticises the decision of Secretary Noble in C. St. P. M. & O. Ry. Co., 9 Land Decisions, 483, 486, 10/11/89, while admitting he does not understand it, won't take the time and energy, but prefers to make his own guess rather than understand and follow a 49-year-old departmental decision in favor of the railroad company, which decision, being unchanged by Congress, is of such character as the Supreme Court says justifies the conclusion that it expresses the congressional intention. *U. S.* v. *Midwest Oil Co.,* 236 U. S. 469, 59 L. Ed. 641; *Bardwell* v. *Petty,* above. Not having been changed by Congress in the Act of 1898, or other Acts, it is adopted and is conclusive and obligatory on the courts. *U. S.* v. *Hermanos,* above.

This exception was restricted to a pure question of law and the District Court stated it was a finely drawn question in which there was some doubt in his mind and therefore he should follow the Master. The Master's conclusion of law are not binding in anywise on the Court;

only his findings of fact carry weight or are conclusive or disputed testimony.

Statements of the Commissioner (R., 531-2) indicate that no argument was presented to him on behalf of the railroad company to the effect that under the foregoing decisions the Noble decision is now obligatory on the courts, such omission is injurious to the rights of the Railroad Company.

X.

ASSIGNMENT OF ERROR XXV.

This assignment (R., 1231) contests the action of the Court in *sustaining* the Government's *twelfth exception* (R., 902) to the master's second report.

The Commissioner held that the Absaroque and Bear Tooth became subject to selection when they ceased to be a part of the Crow Indian Reservation and are as much within the rule of the Forest Reserve case as any other land. This is a correct construction of the Forest Reserve case and the opinion of Attorney General Wickersham in 1912 in 41 L. D. 571, is to the same effect.

The rule is sustained by *United States* v. *Southern Pacific,* 223 U. S. 565, 56 L. Ed. 553 (2/26/12), and *Ryan* v. *Central Pacific,* 99 U. S. 384, 25 L. Ed. 305 (2/3/79).

In *Buttz* v. *Northern Pacific Railroad Co.,* 119 U. S. 55, 30 L. Ed. 330 (11/15/86), the court held that the Indians neither took or held any title against the Railroad Company, and the Court said: "The provisions of the third section, limiting the grant to lands to which the United States had then full title, they not having been reserved, sold, granted, or otherwise appropriated, and being free from preemption or other claims or rights, did not exclude from the grant Indian lands, not thus reserved, sold or appropriated, which were subject simply to their right of occupancy. Nearly all the lands in the Territory of Dakota, and, indeed, a large, if not the greater portion of the lands along the entire route to Puget Sound, on which the road of the Company was to be constructed, was subject to this right of occupancy by the Indians. With knowledge of their title and its impediment to the use of the

lands by the Company, Congress made the grant, with a stipulation to extinguish the title. It would be a strange conclusion to hold that the failure of the United States to secure the extinguishment at the time when it should first become possible to identify the tracts granted, operated to recall the pledge and to defeat the grant. It would require very clear language to justify a conclusion so repugnant to the purposes of Congress expressed in other parts of the Act. The only limitation upon the action of the United States with respect to the title of the Indians was that imposed by the Act of Congress, that they would extinguish the title as rapidly as might be 'consistent with public policy and the welfare of said Indians'. Subject only to that condition, so far as the Indian title was concerned, the grant passed the fee to the Company. In our judgment, the claims and rights mentioned in the third section are such as are asserted to the lands by other parties than Indians having only a right of occupancy."

Buttz v. *Northern Pacific Railroad Company* was followed and approved in the following cases:

Jones v. *Meehan,* 175 U. S. 8, 44 L. Ed. 53 (10/30/99).

United States v. *Ashton*, 170 Fed. 517 (C. C. Wash.) 4/19/09).

United States v. *Moore,* 161 Fed. 515 (C. C. A. 9) (5/18/08).

M. K. & T. R. Co. v. *Roberts,* 152 U. S. 114, at 117, 38 L. Ed. 377, at 379 (3/5/94), which says that the principle asserted in the Buttz case has never "been seriously controverted".

A. & P. Ry. Co. v. *Mingus,* 165 U. S. 438, 41 L. Ed. 780 (2/5/97), which held that courts have nothing to do with obtaining releases from Indians.

Clairmont v. *United States,* 225 U. S. 556, 56 L. Ed. 1203 (6/10/12), which held Montana Flathead Indian Reservation was not Indian as it passed to the Northern Pacific, so Indian Anti-Liquor Law did not apply, citing Buttz and Townsend cases.

U. S. v. *Portneuf-Marsh Valley Irr. Co.,* 213 Fed. 603 (C. C. A. 9) (5/11/14).

St. Paul & C. Ry. Co. v. *Phelps,* 137 U. S. 542, 34 L.

Ed. 722 (12/22/90), which held the same as to the Minnesota Indian lands as the Buttz case.

The lower Court stated it did not care what Judge VanDeventer, or Attorney General Wickersham, or the Land Department had done, and it would overrule them and the Commission.

The Court did not mention *U. S.* v. *Hermanos,* above.

In *United States* v. *Moore,* 161 Fed. Rep. 513 (5/18/08) (C. C. A. 9), reversing 154 Fed. 713, the Court held that Indians to whom lands were allotted in severalty under such treaty acquired a mere right of possession and use, the title remaining in the United States, and that the government was therefore entitled to maintain ejectment against a third person, who had ousted the Indian allottees from possession. The Court said: "It is too late to talk about the original title to all of the lands in the United States having originally been in the Indians. The contrary was long ago settled. 'Undoubtedly,' said the Supreme Court in the comparatively recent case of *Jones* v. *Meehan,* 175 U. S. 18, 20 Sup. Ct. 4, 44 L. Ed. 49, 'the right of the Indian nations or tribes to their lands within the United States was a right of possession or occupancy only. The ultimate title in fee in those lands was in the United States; and the Indian title could not be conveyed by the Indians to any one but the United States, without the consent of the United States', citing *Johnson* v. *McIntosh,* 8 Wheat. 543, 5 L. Ed. 681; *Cherokee Nation* v. *Georgia,* 9 Pet. 1, 17, 8 L. Ed. 25; *Worcester* v. *Georgia,* 6 Pet. 515-544, 8 L. Ed. 483; *Doe* v. *Wilson,* 23 How. 457-463; 16 L. Ed. 584; *United States* v. *Cook,* 19 Wall. 591, 22 L. Ed. 210; *United States* v. *Kagama,* 118 U. S. 375-381, 6 Sup. Ct. 1109, 30 L. Ed. 228; *Buttz* v. *Northern Pacific R. Co.,* 119 U. S. 55-67, 7 Sup. Ct. 100, 30 L. Ed. 330."

In *United States* v. *Ashton,* 170 Fed. 509 at 517 (C. C. Wash.) (4/19/09), the Court held and stated: "The conclusions deducible from the premises are as follows:

"(a) The aboriginal inhabitants of this country were not seised of title to real estate. *Johnson* v. *McIntosh,* 8 Wheat. 543, 5 L. Ed. 681; *United States* v. *Cook,* 19 Wal. 591, 22 L. Ed. 210; *Buttz* v. *Northern Pacific R. Co.,* 119 U. S. 55, 7 Sup. Ct. 100, 30 L. Ed. 330; *United States* v. *Moore,* 161 Fed. 513, 88 C. C. A. 455. All exclusive rights

of the Indian complainants, as original occupiers of the country, were terminated by the Oregon donation law, and were relinquished by them by the treaty of 1854."

In *United States* v. *Portneuf-Marsh Valley Irr. Co.*, 213 Fed. 601 at 603 (C. C. A. 9) (5/11/14), affirming 205 Fed. 416, the Court held and stated: "We think that the grant of rights of way through the 'public lands and reservations of the United States', in the Act of March 3, 1891, was intended to include Indian reservations. At the date of that act the Indian reservations were the only considerable reservations of the United States. Military reservations were comparatively small and compact, and were not contiguous to arid lands which might be reclaimed by irrigation. The forest reserve policy of the government had not then been inaugurated. That the United States had the power to grant rights of way over Indian reservations, notwithstanding its treaty obligations with the Indians, had already been firmly established. *Buttz* v. *Northern Pacific Railroad,* 119 U. S. 55, 7 Sup. Ct. 100, 30 L. Ed. 330. It was reaffirmed in *Missouri, Kansas & Texas Ry. Co.* v. *Roberts,* 152 U. S. 114, 14 Sup. Ct. 496, 38 L. Ed. 377. In the case last cited, although a treaty had been made between the United States and the Osage Indians, reserving to the latter the lands through which the railroad was granted its right-of-way, the court said: 'The United States had the right to authorize the construction of the road of the Missouri, Kansas & Texas Railway Company through the reservation of the Osage Indians, and to grant absolutely the fee of the 200 feet as a right-of-way to the company. Though the lands of the Indians were reserved by treaty for their occupation, the fee was always under the control of the government.'

"That an Indian reservation is included in the term 'reservations of the United States' is indicated by the decision in that case, as well as by the *Leavenworth, etc., R. Co.* v. *United States,* 92 U. S. 733, 747 (23 L. Ed. 634) in which the court said: 'Every tract set apart for special uses is reserved to the government, to enable it to enforce them. There is no difference in this respect, whether it be appropriated for Indian or for other purposes.'

"And referring to the lands reserved by treaty to the Osage Indians, the court observed: 'The treaty reserved them as much to one as to the other of the contracting parties. Both were interested therein and had title thereto. In one sense they were reserved to the Indians; but, in an-

other and broader sense, to the United States for the use of the Indians.'

"In the case of Rio Verde Canal Co., 27 Land Dec. Dept. Int. 421, Mr. Secretary Bliss in his opinion said: 'The provisions of section 18, Act of Congress of March 3, 1891, granting the right of way through the public lands and reservations of the United States for irrigation purposes, include Indian reservations, subject to the condition that the location and construction of the ditch or canal shall not interfere with the proper occupation of such reservations by the government for Indian purposes and uses. * * * There is no reason apparent why such reservation should not be subject to the grant of the right of way as any other reservation, and the executive department having jurisdiction of such reservation will determine whether it can be so located, and will withhold or give its approval accordingly.' "

These constructions of the grant since the Buttz case of 1886 not having been changed by Congress have thereby been adopted by Congress and are obligatory on the courts under *U. S.* v. *Hermanos* and other decisions, above.

In *Direction Disconto-Gesill-Schaft* v. *U. S. Steel Corp.*, 267 U. S. 22, 69 L. Ed. 495, at 498, the Court said: "But it (the U. S.) prefers to consider itself civilized and to act accordingly."

In *Beyn, Meyer & Co.* v. *Miller,* 266 U. S. 457, 69 L. Ed. 374 at 387, the Court said: "The contrary view, urged by appellees, would greatly qualify, perhaps delete, this subsection, and would place the United States in the unenviable position of positively *refusing,* after hostilities has ended, *to give up property which had been taken contrary to their own laws.* It would require very clear words to convince us that Congress intended any such thing."

The Government is bound by the same rules as to contracts as are applicable to contracts between private parties.

The Courts must apply on Government contracts the ordinary principles of contracts. Smoot's Case, 15 Wall. at 45, 21 L. Ed. 107.

"When the Government enters into a contract with an individual, it deposes as to the matter of the contract,

its constitutional authority and exchanges the character of legislator to that of moral agent with the same rights and obligations as an individual." 30 Ct. Cls. R., 352, 361; 1 *id.* 191; 11 *id.* 520; 28 *id.* 77, 105.

"When the Government enters into a contract with an individual or corporation it divests itself of its sovereign character so far as concerns the particular transaction and takes that of an ordinary citizen; and it has no immunity which permits it to recede from the fulfillment of this obligation." *U. S.* v. *N. A. C. Co.,* 74 Fed. R. 145, 151 (C. C. S. D., N. Y., 4/27/96).

"If it (the United States) comes down from its position of sovereignty and enters the domain of commerce, it submits itself to the laws that govern individuals there." *Cooke* v. *U. S.,* 91 U. S. 398; 23 L. Ed. 237.

"This is extending the rule between private parties to the Government." *United States* v. *Mason & Hanger Co.,* 260 U. S. 323, judgment affirmed on rehearing, 261 U. S. 610, 67 L. Ed. 286, 825.

XI.

ASSIGNMENT OF ERROR XXX.

This assignment (R., 1232) involves the third exception of the railroad company to the second report (R., 890), which exception contends that there is no warrant to be found in the terms of the Joint Resolution limiting the selection and second indemnity to losses arising in the state or territory to which the limits appertain.

The Commissioner held otherwise and it seems that his holding is contrary to the decision in *United States* v. *Northern Pacific,* 256 U. S. 51, 65 L. Ed. 825.

The Commissioner discusses this question (R., 703, 830), but fails to mention (they may not have been drawn to his or the Court's attention) the decision in 22 L. Ed. 187, being the opinion of Attorney General Garland (1/17/80), 19 Ops. A. G. 498, the decision in 24 L. D. 417, and 26 L. D. 312, all three of which were followed and approved by Attorney General Wickersham (7/24/12), in 41 L. D. 571, where he held that the Railroad Company, in making indemnity selections, was not restricted to the State or Territory in which the loss occurred.

The principle of adoption by Congress of such rulings is applicable here. (See cases above.)

The Act of July 1, 1896, construed and/or defined the Act of 1864 and the Joint Resolution of 1870 to permit the Railroad Company to make indemnity selections for loss in one State or Territory from lands "situated *within any State* or *Territory* into which such railroad *grant extends*".

This is certainly an adoption of the construction of the grant established in above Department Decisions.

XII.

ASSIGNMENT OF ERROR XXXI.

This assignment (R., 1232) involves the denial of the railroad's fourth exception (R., 890) that the Commissioner was wrong in holding that the Government may reserve or appropriate to its own uses lands in indemnity limits so long as that which remains is sufficient to meet all unsatisfied losses.

The vice of this is that it gives the Government the right to make the choice as to land to go to the railroad whereas the grant gave the railroad the choice of the land.

The Government cannot withdraw all the good lands and force the Railroad to take the worthless lands.

The cases cited above, including the Forest Reserve case, and others that the Government can do no wrong are applicable here.

The Commissioner's reasoning (R., 828, 829) is without merit and is not persuasive.

XIII.

ASSIGNMENT OF ERROR XXVI.

This assignment (R., 1231) involves plaintiff's exceptions to the second report Nos. 16 to 27, inclusive (R., 905 to 921), and 38 and 39 (R., 929-30), involving substitution of base, which exceptions the Court allowed. The mineral indemnity provision in the grant of 1864 was as follows: "That all mineral lands be, and the same are hereby, ex-

cluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd-numbered sections, nearest to the line of said road *and within fifty miles thereof* may be selected as above provided."

But when the Act was published by the Government in 13 Stats. 365, the underscored words in the last line "and within fifty miles thereof" were omitted and the error was not discovered until 1904. The Commissioner made in effect a finding of fact on the testimony and stated as follows (R., 791): *"I have no difficulty whatever in saying that it sufficiently appears from the testimony that the company did act to its prejudice in reliance upon the statute as printed, and that had the statute been correctly printed or had the company's officers then known of the mistake, it would have acted differently."*

The Court was bound by this finding of fact by the Commissioner. It must be remembered that the *error was made by the Government,* as its Attorney General supervised the printing (R., 787) and the true copy was kept by the Government. The Commissioner also stated (R., 799): "In any event the Act of June 25, 1929, directs this court to review the administration of the Northern Pacific grants from the beginning, requiring it to correct any errors. *Now to say that the review cannot be had because of lapse of time is to argue that the statute should not be obeyed."*

The Commissioner held that it was a mistake of fact (R., 808) and that the railroad is entitled to relief. He further held that if it was a mutual mistake of law, the railroad is entitled to relief therefrom and quoted Pomeroy and others to sustain the position. The Commissioner held (R., 785) that the United States seeking equity must do equity.

The law does not permit anyone to benefit by his own or his employees' wrongs and errors and the same principle is applicable to the United States under Smoot's case and others, above.

Likewise, the Supreme Court has stated (above) that the United States should not and will not do any wrong.

Because the United States will not do any wrong Con-

gress passed the July 1, 1898, Act to rectify wrongs and injury done the Railroad Company through errors and mistakes of its Executive Departments where there would have been multitudinous litigation had the making of the necessary corrections and compensation been left to the courts. See *Humbird* v. *Avery,* above.

This Act shows the Congressional intention, rather determination, that wrongs and injuries due to mistakes of Government officials must be compensated and rectified as quick as is reasonably feasible.

In the instant question Congress thought that as only the Government and the Railroad Company were interested in the question that the injury done the Railroad (as found by the Commissioner as a fact) by the error in printing the statute, the compensation due the Railroad therefor could easily be adjusted in one suit, and accordingly enacted the 1929 Act. Then considering the 1898 and 1929 Acts together it is clear Congress intended that the Railroad must be compensated for such injury in the instant suit.

XIV.

ASSIGNMENT OF ERROR XXVII.

This assignment (R., 1231) involves the granting by District Court of plaintiff's exceptions, (A): Nos. 40, 43 (a), (b), (3) and 1,600 and 2,217 acres in (h), 44, 48 and 49 on the availability of withdrawing lands subject to indemnity selection.

(B): Nos. 55 and 56, involving Fort Ellis Military Reservation.

The Commissioner discussed the matters involved in plaintiff's Exception Nos. 40, 43, (e) and 1,600 and 2,217 acres in (h) as well as Nos. 55 and 56 along with plaintiff's Exception 12, above, and what is said as to Assignment of Error XXV, above, on said Exception 12 is applicable to these other exceptions mentioned in this sentence. There are other apparent reasons and also reasons stated in the report sustaining the Commissioner on these questions.

In Exceptions Nos. 43 (a), (b) and (d) the United States contended the Commissioner found facts contrary to evidence on testimony which was in dispute; such finding is binding on the District Court. Exception 40 is contrary to the Forest Reserve case.

A careful reading of the Commissoner's report shows there is no merit in plaintiff's Exception No. 44. Plaintiff's Exception 48 simply raised a question of fact on disputed testimony and the report, therefore, could not be changed by the Court.

Plaintiff's Exception No. 49 is not tenable as it is contrary to the Forest Reserve case.

Plaintiff's Exceptions Nos. 55 and 56 are without merit for the same reasons that Exception No. 12 has no merit.

The constructions of the grant in decisions cited to Exception No. 12, having been adopted by Congress are, under the Hermanos case and others, above, obligatory on the Courts.

The relief and decisions requested in the Conclusion of appellant's brief should, we respectfully submit, be given.

Respectfully submitted,

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ROBERT L. EDMISTON,
RAYMOND M. HUDSON,
MINOR HUDSON,
GEOFFREY CREYKE, JR.,
Attorneys for Appellants.

December 15, 1938.

APPENDIX

ACT OF JULY 2, 1864.

AN ACT granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's Sound, on the Pacific coast, by the northern route.

13 Stat. 365.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That Richard D. Rice, John A. Poore, Samuel P. Strickland, Samuel C. Fessenden, * * * and all such other persons who shall or may be associated with them, and their successors, are hereby created and erected into a body corporate and politic, in deed and in law, by the name, style, and title of the "Northern Pacific Railroad Company," and by that name shall have perpetual succession, and shall be able to sue and be sued, plead and be impleaded, defend and be defended, in all courts of law and equity within the United States, and may make and have a common seal. And said corporation is hereby authorized and empowered to lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph line, with the appurtenances, namely, beginning at a point on Lake Superior, in the State of Minnesota or Wisconsin; thence westerly by the most eligible railroad route, as shall be determined by said company, within the territory of the United States on a line north of the forty-fifth degree of latitude to some point on Puget's Sound, with a branch, via the valley of the Columbia River, to a point at or near Portland, in the State of Oregon, leaving the main trunk line at the most suitable place, not more than three hundred miles from its western terminus; and is hereby vested with all the powers, privileges, and immunities necessary to carry into effect the purposes of this act as herein set forth. The capital stock of said company shall consist of one million shares of one hundred dollars each, which shall in all respects be deemed personal property, and shall be transferable in such manner as the by-laws of said corporation shall provide. The persons herein before named are hereby appointed commissioners, and shall be called the Board of Commissioners of the "Northern Pacific Railroad Company," and fifteen shall constitu[t]e a quorum for the transaction of business. The first meeting of said Board of Commissioners shall be held at the Melodeon Hall, in the city of Boston, at such time as any five commissioners herein named from Massachusetts shall appoint, not more than three months after the passage of this act, notice of which shall be given by them to the other commissioners by publish-

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ing said notice in at least one daily newspaper in the cities of Boston, New York, Philadelphia, Cincinnati, Milwaukee, and Chicago, once a week at least four weeks previous to the day of meeting. Said board shall organize by the choice from its number of a president, vice-president, secretary, and treasurer, and they shall require from said treasurer such bonds as may be deemed proper, and may from time to time increase the amount thereof as they may deem proper. The secretary shall be sworn to the faithful performance of his duties, and such oath shall be entered upno the records of the company, signed by him, and the oath verified thereon. The president and secretary of said board shall in like manner call all other meetings naming the time and place thereof. It shall be the duty of said board of commissioners to open books, or cause books to be opened, at such times, and in such principal cities or other places in the United States, as they, or a quorum of them, shall determine, within six months after the passage of this act, to receive subscriptions to the capital stock of said corporation, and a cash payment of ten per centum on all subscriptions and to receipt therefor. So soon as twenty thousand shares shall in good faith be subscribed for, and ten dollars per share actually paid into the treasury of the company, the said president and secretary of said board of commissioners shall appoint a time and place for the first meeting of the subscribers to the stock of said company, and shall give notice thereof in at least one newspaper in each State in which subscription books have been opened, at least fifteen days previous to *to* the day of meeting, and such subscribers as shall attend the meeting so called, either in person or by lawful proxy, then and there shall elect by ballot thirteen directors for said corporation; and in such election each share of said capital stock shall entitle the owner thereof to one vote. The president and secretary of the board of commissioners, and, in case of their absence or inability, any two of the officers of said board, shall act as inspectors of said election, and shall certify under their hands the names of the directors elected at said meeting; and the said commissioners the treasurer, and secretary, shall then deliver over to said directors all the properties, subscription books and other books in their possession, and thereupon the duties of said commissioners and the officers previously appointed by them, shall cease and determine forever, and thereafter the stockholders shall constitute said body politic and corporate. Annual meetings of the stockholders of the said corporation for the choice of officers (when they are to be chosen) and for the transaction of business, shall be holden at such time and place and upon such notice as may be prescribed in the by-laws.

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Sec. 2. *And be it further enacted,* That the right of way through the public lands be, and the same is hereby, granted to said "Northern Pacific Railroad Company," its successors and assigns, for the con-

struction of a railroad and telegraph as proposed; and the right, power and authority is hereby given to said corporation to take from the public lands, adjacent to the line of said road, material of earth, stone, timber, and so forth, for the construction thereof. Said way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary ground for station building, workshops, depots, machine shops, switches, side tracks, turn-tables, and water stations; and the right of way shall be exempt from taxation within the Territories of the United States. The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the said Indians, the Indian titles to all lands falling under the operation of this act, and acquired in the donation to the [road] named in this bill.

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Right of wa exempt from tax ation.

Indian titles t be extinguishe by the United States.

Sec. 3. *And be it further enacted,* That there be, and hereby is, granted to the "Northern Pacific Railroad Company," its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed, and plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections: *Provided,* That if said route shall be found upon the line of any other railroad route to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: *Provided further,* That the railroad company receiving the previous grant of land may assign their interest to said "Northern Pacific Railroad Company," or may consolidate, confederate, and associate with said company upon the terms named in the first section of this act: *Provided further,* That all mineral

Grant of land.

Forty sectio per mile in t Territories.

Twenty se tions per mile the States.

Other lands lieu of those r served, etc.

Land limits.

If route is up the line of a other aided ro former gra shall be deduc ed.

Road havi previous gra may assign.

Mineral" ds not grant-

Agricultural ds may be se-ted in lieu of eral lands.

Mineral" does include iron coal.

lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd-numbered sections, nearest to the line of said road, and within fifty miles thereof, may be selected as above provided: *And provided further,* That the word "mineral," when it occurs in this act, shall not be held to include iron or coal: *And provided further,* That no money shall be drawn from the Treasury of the United States to aid in the construction of the said "Northern Pacific Railroad."

'he President appoint three mmissioners examine road.

Sec. 4. *And be it further enacted,* That whenever said "Northern Pacific Railroad Comupany "shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated the President of the United States shall appoint three commissioners to examine the same, and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial and workmanlike manner, as in all other respects required in this act, the commissioners shall so report to the President of the United States, and patents of lands as aforesaid shall be issued to said company, confirming to said company the right and title to said lands, situated opposite to, and conterminous with, said completed section of said road; and, from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed, and in readiness as aforesaid, and verified by said commissioners to the President of the United States, then patents shall be issued to said company conveying the additional sections of land as aforesaid, and so on as fast as every twenty-five miles of said road is completed: *Provided,* That no more than ten sections of land per mile, as said road shall be completed, shall be conveyed to said company for all that part of said railroad lying east of the western boundary of the State of Minnesota, until the whole of said railroad shall be finished and in good running order, as a first class railroad, from the place of beginning on Lake Superior to the western boundary of Minnesota: *Provided also,* That lands shall not be granted under the provisions of this act on account of any railroad, or part thereof, constructed at the date of the passage of this act.

o m missioners report to the sident.

Proviso as to ds in Minne-a.

Proviso as to id previously lt.

Road to be con-ructed as a st-class" rail-d.

Sec. 5. *And be it further enacted,* That said Northern Pacific Railroad shall be constructed in a substantial and workmanlike manner, with all the necessary draws, culverts, bridges, viaducts, crossings, turnouts, stations, and watering places, and all other appurtenances, including furniture, and rolling stock, equal in all respects to railroads of the first class, when prepared for business, with rails of the best quality, manufactured from American iron. And a uniform gauge shall be established throughout the entire length of the road. And there shall be constructed a telegraph line, of the most substantial and approved description, to be operated along the entire line: *Provided,* That the said company shall not charge the Government

Rails of Ameri-n iron. (See 16 Stat., 378.)

Gauge to be iform.

Telegraph line.

Condition as to arges for Gov-

higher rates than they do individuals for like transportation and telegraphic service. And it shall be the duty of the Northern Pacific Railroad Company to permit any other railroad which shall be authorized to be built by the United States, or by the legislature of any Territory or State in which the same may be situated, to form running connections with it, on fair and equitable terms.

ernment tran portation and t egraphic servic

Other roa may form ru nings connectio on equitab terms.

SEC. 6. *And be it further enacted,* That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or pre-emption before or after they are surveyed, except by said company, as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled "An act to secure homesteads to actual settlers on the public domain," approved May twenty, eighteen hundred and sixty-two, shall be, and the same is hereby, extended to all other lands on the line of said road, when surveyed, excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the Government at a price less than two dollars and fifty cents per acre, when offered for sale.

Lands to be su veyed as fast construction road may requi

Governme lands not to sold for less th $2.50 per acre.

SEC. 7. *And be it further enacted,* That the said "Northern Pacific Railroad Company" be, and is hereby, authorized and empowered to enter upon, purchase, take, and hold any lands or premises that may be necessary or proper for the construction and working of said road, not exceeding in width two hundred feet on each side of the line of its railroad, unless a greater width be required for the purpose of excavation or embankment; and also any lands or premises that may be necessary and proper for turnouts, standing places for cars, depots, station-houses, or any other structures required in the construction and working of said road. And the said company shall have the right to cut and and remove trees and other material that might, by falling, encumber its road-bed, though standing or being more than two hundred feet from the line of said road. And in case the owner of such lands or premises and the said company cannot agree as to the value of the premises taken, or to be taken for the use of said road, the value thereof shall be determined by the appraisal of three disinterested commissioners, who may be appointed, upon application by either party, to any court of record in any of the territories in which the lands or premises to be taken lie; and said commissioners, in their assessment of damages, shall appraise such premises at what would have been the value thereof if the road had not been built. And upon return into court of such appraisement, and upon the payment into the same of the estimated value of the premises taken for the use and

Authorizes co pany to take a lands necessa for constructi of its road.

200 feet on ea side.

Lands for pots, etc.

Damages to determined commissions.

Procedure.

benefit of the owner thereof, said premises shall be deemed to be taken by said company, which shall thereby acquire full title to the same for the purpose aforesaid. And either party feeling aggrieved at said appraisement may, within thirty days after the same has been returned into court, file an appeal therefrom, and demand a jury of twelve men to estimate the damage sustained; but such appeal shall not interfere with the rights of said company to enter upon the premises taken, or to do any act necessary and proper in the construction of its road. And said party appealing shall give bonds, with sufficient surety or sureties, for the payment of any cost that may arise upon such appeal; and in case the party appealing does not obtain a verdict, increasing or diminishing, as the case may be, the award of the commissioners, such party shall pay the whole cost incurred by the appellee, as well as his own, and the payment into court, for the use of the owner of said premises taken, of a sum equal to that finally awarded, shall be held to vest in said company the title of said land, and of the right to use and occupy the same for the construction, maintenance, and operation of said road. And in case any of the lands to be taken, as aforesaid, shall be held by any infant, femme covert, non compos, insane person, or persons residing without the Territory within which the lands to be taken lie, or person subjected to any legal disability, the court may appoint a guardian for any party under any disqualification, to appear in proper person, who shall give bonds, with sufficient surety or sureties, for the proper and faithful execution of his trust, and who may represent in court the person disqualified, as aforesaid, from appearing, when the same proceedings shall be had in reference to the appraisement of the premises to be taken for the use of said company, and with the same effect as has been already described; and the title of the company to the lands taken by virtue of this act shall not be affected or impaired by reason of any failure by any guardian to discharge faithfully his trust. And in case any party shall have a right or claim to any land for a term of years, or any interest therein, in possession, reversion, or remainder, the value of any such estate, less than a fee simple, shall be estimated and determined in the manner hereinbefore set forth. And in case it shall be necessary for the company to enter upon any lands which are unoccupied, and of which there is no apparent owner or claimant, it may proceed to take and use the same for the purposes of said railroad, and may institute proceedings, in manner described, for the purpose of ascertaining the value of, and acquiring title to, the same; but the judge of the court hearing said suit shall determine the kind of notice to be served on such owner or owners, and he may in his discretion appoint an agent or guardian to represent such owner or owners in case of his or their incapacity or non-appearance. But in case no claimant shall appear within six years from the time of the opening

What proceedings in cases of lands held by any infant or person subject to any legal disability.

Other proceedings.

Proceedings when lands are unoccupied.

Claims barred if not made within six years.

of said road across any land, all claims to damages against said company shall be barred.

Grants made subject to certain conditions.

SEC. 8. *And be it further enacted,* That each and every grant, right, and privilege herein are so made and given to, and accepted by said Northern Pacific Railroad Company, upon and subject to the following conditions, namely: that the said company shall commence the work on said road within two years from the approval of this act by the President, and shall complete not less than fifty miles per year after the second year, and shall construct, equip, furnish, and complete the whole road by the fourth day of July, anno Domini eighteen hundred and seventy-six.

Whole road to be completed by July 4, 1876.

Joint res. May 7, 1867, time extended two years; joint res. July 1, 1868; sec. 3 amended.

SEC. 9. *And be it further enacted,* That the United States make the several conditioned grants herein, and that the said Northern Pacific Railroad Company accept the same, upon the further condition that if the said company make any breach of the conditions hereof, and allow the same to continue for upwards of one year, then, in such case, at any time hereafter, the United States, by its Congress, may do any and all acts and things which may be needful and necessary to insure a speedy completion of said road.

Congress may do anything necessary to insure a speedy completion of the road.

SEC. 10. *And be it further enacted,* That all people of the United States shall have the right to subscribe to the stock of the Northern Pacific Railroad Company until the whole capital named in this act of incorporation is taken up, by complying with the terms of subscription; and no mortgage or construction bonds shall ever be issued by said company on said road, or mortgage, or lien made in any way, except by the consent of the Congress of the United States.

All people of the United States may subscribe to the stock, until whole amount taken up.

No bonds to be issued without consent of Congress.

SEC. 11. *And be it further enacted,* That said Northern Pacific Railroad, or any part thereof, shall be a post-route and a military road, subject to the use of the United States, for postal, military, naval, and all other government service, and also subject to such regulations as Congress may impose restricting the charges for such Government transportation.

To be a post route and military road.

Congress may restrict charges for Government transportation.

SEC. 12. *And be it further enacted,* That the acceptance of the terms, conditions, and impositions of this act by the said Northern Pacific Railroad Company shall be signified in writing under the corporate seal of said company, duly executed pursuant to the direction of its board of directors first had and obtained, which acceptance shall be made within two years after the passage of this act, and not afterwards, and shall be served on the President of the United States.

Company to accept terms, conditions, &c., within two years.

SEC. 13. *And be it further enacted,* That the directors of said company shall make an annual report of their proceedings and expenditures, verified by the affidavits of the president and at least six of the directors, and they shall, from time to time, fix, determine, and regulate the fares, tolls, and charges to be received and paid for transportation of persons and property on said road, or any part thereof.

Annual report to be verified by affidavits of president and six directors of company.

Election of esident and ce - president om board of di- ctors.

Sec. 14. *And be it further enacted,* That the directors chosen in pursuance of the first section of this act shall, as soon as may be after their election, elect from their own number a president and vice-president; and said board of directors shall, from time to time, and as soon as may be after their election, choose a treasurer and secretary, who shall hold their offices at the will and pleasure of the board of directors. The treasurer and secretary shall give such bonds, with such security as the said board from time to time may require. The secretary shall, before entering upon his duty, be sworn to the faithful discharge thereof, and said oath shall be made a matter of record upon the books of said corporation. No person shall be a director of said company unless he shall be a stockholder, and qualified to vote for directors at the election at which he shall be chosen.

Treasurer and cretary.

Term of office president, vice- esident, and di- ctors not to ex- ed three years.

Sec. 15. *And be it further enacted,* That the president, vice-president, and directors shall hold their offices for the period indicated in the by-laws of said company, not exceeding three years, respectively, and until others are chosen in their place and qualified. In case it shall so happen that an election of directors shall not be made on any day appointed by the by-laws of said company, the corporation shall not for that excuse be deemed to be dissolved, but such election may be holden on any day which shall be appointed by the directors. The directors, of whom seven, including the president, shall be a quorum for the transaction of business, shall have full power to make and prescribe such by-laws, rules, and regulations as they shall deem needful and proper touching the disposition and management of the stock, property, estate and affects of the company, the transfer of shares, the duties and conduct of their officers and servants touching the election and meeting of the directors, and all matters whatsoever, which may appertain to the concerns of said company; and the said board of directors may have full power to fill any vacancy or vacancies that may occur from any cause or causes from time to time in their said board. And the said board of directors shall have power to appoint such engineers, agents, and subordinates as may from time to time be necessary to carry into effect the object of the company, and to do all acts and things touching the location and construction of said road.

Directors em- wered to make -laws, rules and gulations.

Directors may l vacancies in ard.

Directors em- wered to ap- int engineers, ents, &c.

Sec. 16. *And be it further enacted,* That it shall be lawful for the directors of said company to require payment of the sum of ten per centum cash assessment upon all subscriptions received of all subscribers, and the balance thereof at such times and in such proportions and on such conditions as they shall deem to be necessary to complete the said road and telegraph line within the time in this act prescribed. Sixty days' previous notice shall be given of the payments required, and of the time and place of payment, by publishing a notice once a week in one daily newspaper in each of the cities of Boston, New York, Philadelphia, and Chicago; and in case any stockholder shall neglect

Directors to re- ire payment of n per centum sh assessment, d balance of ubscription nen needed.

or refuse to pay, in pursuance of such notice, the stock held by such person shall be forfeited absolutely to the use of the company, and also any payment or payments that shall have been made on account thereof, subject to the condition that the board of directors may allow the redemption on such terms as they may prescribe.

Forfeited st may be redeem on terms p scribed by dir tors.

SEC. 17. *And be it further enacted,* That the said company is authorized to accept to its own use any grant, donation, loan, power, franchise, aid, or assistance which may be granted to, or conferred upon, said company by the Congress of the United States, by the legislature of any State, or by any corporation, person, or persons; and said corporation is authorized to hold and enjoy any such grant, donation, loan, power, franchise, aid, or assistance, to its own use for the purpose aforesaid.

Company thorized to acc other gran franchises, &c.

SEC. 18. *And be it further enacted,* That said Northern Pacific Railroad Company shall obtain the consent of the legislature of any State through which any portion of said railroad line may pass previous to commencing the construction thereof; but said company may have the right to put on engineers and survey the route before obtaining the consent of the legislature.

Consent of St legislatures to obtained.

SEC. 19. *And be it further enacted,* That unless said Northern Pacific Railroad Company shall obtain *bona fide* subscriptions to the stock of said company to the amount of two millions of dollars, with ten per centum paid within two years after the passage and approval of this act, it shall be null and void.

Act to be n and void, unl two millions dollars of st are subscribed within two yea

SEC. 20. *And be it further enacted,* That the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the Government at all times (but particularly in time of war) the use and benefits of the same for postal, military, and other purposes, Congress may, at any time, having due regard for the rights of said Northern Pacific Railroad Company, add to, alter, amend, or repeal this act.

Congress m add to, alt amend, or rep this act, havi due regard the rights of company.

JOINT RESOLUTION OF MAY 7, 1866.

No. 34.—A RESOLUTION extending the time for the completion of the Union Pacific Railway, eastern division, and Northern Pacific Railroad.

14 Stat. 3

* * * * * * * *

SEC. 2. *And be it further resolved,* That the time for commencing, and completing the Northern Pacific Railroad, and all its several sections, is extended for the term of two years.

Northern Pac Railroad.

JOINT RESOLUTION OF JULY 1, 1868.

Stat., p. 255.

No. 47.—JOINT RESOLUTION extending the time for the completion of the Northern Pacific Railroad.

ction 8, chap. 13 Stat., 370, nded.

me extended July 4, 1879. res. of May 866, 14 Stat.,

Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That section eight of an act entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific coast, "is hereby so amended as to read as follows: That each and every grant, right, and privilege herein, are so made and given to and accepted by said Northern Pacific Railroad Company upon and subject to the following conditions, namely: That the said company shall commence the work on said road within two years from and after the second day of July, eighteen hundred and sixty-eight, and shall complete note less than one hundred miles per year after the second year thereafter, and shall construct, equip, furnish, and complete the whole road by the fourth of July, anno Domini eighteen hundred and seventy-seven.

JOINT RESOLUTION OF MARCH 1, 1869.

5 Stat., 346.
3 Stat., 370.

No. 15.—JOINT RESOLUTION gra[n]ting the Consent of Congress provided for in section ten of the Act incorporating the Northern Pacific Railroad Company, approved July second, eighteen hundred and sixty-four.

onsent of Congress given to ie mortgage ds for construction purses.

Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the consent of the Congress of the United States is hereby given to the Northern Pacific Railroad Company to issue its bonds, and to secure the same by mortgage upon its railroad and its telegraph line, for the purpose of raising funds with which to construct said railroad and telegraph line between Lake Superior and Puget Sound, and also upon its branch to a point at or near Portland, Oregon; and the term "Puget Sound," as used here and in the act incorporating said company, is hereby construed to mean all the waters connected with the Straits of Juan de Fuca within the territory of the United States.

Ieaning of rm "Puget ind".

JOINT RESOLUTION OF APRIL 10, 1869.

No. 20.—JOINT RESOLUTION granting Right of Way for the Construction of a Railroad from a Point at or near Portland, Oregon, to a Point west of the Cascade Mountains, in Washington Territory.

16 Stat., 57.

Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the Northern Pacific Railroad Company be, and hereby is, authorized to extend its branch line from a point at or near Portland, Oregon, to some suitable point on Puget Sound, to be determined by said company, and also to connect the same with its main line west of the Cascade Mountains, in the Territory of Washington; said extension being subject to all the conditions and provisions, and said company in respect thereto being entitled to all the rights and privileges conferred by the act incorporating said company, and all acts additional to and amendatory thereof: *Provided,* That said company shall not be entitled to any subsidy in money, bonds, or additional lands of the United States, in respect to said extension of its branch line as aforesaid, except such lands as may be included in the right of way on the line of such extension as it may be located: *And provided further,* That at least twenty-five miles of said extension shall be constructed before the second day of July, eighteen hundred and seventy-one, and forty miles per year thereafter until the whole of said extension shall be completed.

Company authorized to extend its branch line from Portland to Puget Sound.

Not entitled hereby to any subsidy or additional lands.

In *F. N. B.* v. *Flushem,* 290 U. S. 509, 78 L. Ed. 475, the Court said: "The power of the District Court was invoked, not to enforce rights of creditors, but to defeat them. The fact that the means employed to effect the fraudulent conveyance was the judgment of a court and not a voluntary transfer does not remove the taint of illegality.* *Jackson* v. *Ludeling,* 21 Wall. 616, 22 L. Ed. 492; compare *Jones* v. *Milwaukee & M. R. Co.,* 6 Wall. 752, 18 L. Ed. 885; *Northern P. R. Co.* v. *Boyd,* 228 U. S. 482, 507, 57 L. Ed. 931, 943, 33 S. Ct. 554. Nor is it material that the Corporation became insolvent later, long before entry of the order of sale, and that, but for the appointment of receivers, some non-assenting debenture holders would have obtained a preference. The lack of equity in the bill when filed is not cured by the insolvency later occurring. Compare *Pusey & J. Co.* v. *Hanssen,* 261 U. S. 491, 67 L. Ed. 763, 43 S. Ct. 454. Moreover, the insolvency which supervened was precipitated by the Reorganization Committee, then the only plaintiffs in this suit. It was at their request that the Bankers Trust Company, as trustee, declared the principal of the debentures due; recovered judgment thereon for $10,673,000; and intervened as party plaintiff. These acts were steps in carrying out the plan in which the Corporation, the Committee and the Trust Company co-operated."

J. C. C. HEARINGS, 5247-8.

Under the 1896 reorganization proceedings the Northern Pacific Railway Co. acquired the land grant and other properties of the Northern Pacific Railroad Co. On November 10, 1896, the Northern Pacific Railway Co. issued its prior lien and general-lien mortgages, subjecting the land grant thereto (pp. 4724-4773).

In the case of the *United States* v. *Northern Pacific* (256 U. S. 51), the Supreme Court of the United States said, in referring to the obligations of the Northern Pacific Railroad Co. and the Northern Pacific Railway Co.:

*"An execution sale under a consent judgment, where the consent is, in effect, not the act of the defendant, but that of the plaintiff prosecuting the action, is in reality merely a voluntary transfer. To give it any better standing would be the grossest sacrifice of substance to form." *Title Ins. & T. Co.* v. *California Development Co.,* 171 Cal. 173, 210, 152 Pac. 542. See also *Metcalf* v. *Moses,* 35 App. Div. 596, 55 N. Y. Supp. 179, 161 N. Y. 587, 56 N. E. 67; *Mechanics Nat. Bank* v. *Burnet Mfg. Co.,* 33 N. J. Eq. 486; *Atwater* v. *American Exch. Nat. Bank,* 152 Ill. 605, 38 N. E. 1017; *Skinner* v. *J. I. Case Threshing Mach. Co.,* Ind. , 182 N. E. 99; *Hill* v. *Pioneer Lumber Co.,* 113 N. C. 173, 18 S. E. 107, 21 L. R. A. 560, 37 Am. St. Rep. 621.

The rights and obligations of the original railroad company arising out of the grant have long since passed to the present railway company, and there is no need here for distinguishing one company from the others.

It is obvious, therefore, that the present Northern Pacific Railway Co. carries all of the obligations of the Northern Pacific Railroad Co. arising out of the grant, and that by succeeding to the rights of the Northern Pacific Railroad Co. the Northern Pacific Railway Co. is responsible for the obligations of the Northern Pacific Railroad Co. Furthermore, it must be remembered that in the 1875 reorganization proceedings and in the 1896 reorganizations proceedings the United States was not a party.

While Mr. Donnelly (p. 522) stated that the obligations imposed upon the old company rest upon the new company, he stated that when in 1896 the lands were obtained by an independent purchaser (the Northern Pacific Railway Co. purchased them from the Northern Pacific Railroad Co.) that the lands were freed from the provisions of the resolution of 1870; he stated again (p. 523) that the granted lands were subject to the obligations of the Joint resolution under the foreclosure of 1896, at which time the purchaser, the Northern Pacific Railway Co., took them freed from the obligation of the resolution of 1870. Mr. Donnelly's position here is contrary to the law and to the facts. The Northern Pacific Railway Co. was not an independent purchaser for the reason I have indicated under item 9 in connection with the sale of the lands of the grant under the 1896 reorganization. The Supreme Court of the United States in the Boyd cases (p. 3183-3234) repudiated the theory that the Northern Pacific Railway Co. was an independent purchaser in the 1896 foreclosure. Mr. Donnelly and Mr. Bunn were the attorneys for the Northern Pacific in the Boyd cases. Mr. Bunn (p. 586) indicated some uncertainty as to the present status of the Northern Pacific Railroad Co. I observed (p. 46-49) that the Northern Pacific Railroad Co. since 1896 has for practical purposes been a defunct concern. It is kept alive, however, by the Northern Pacific Railway Co. which controls the stock of the old Northern Pacific Railroad Co. and it holds annual meetings in the offices of the Northern Pacific Railway Co.

J. C. C. HEARINGS, pp. 4648 to 4653.

Mr. McGowan: In connection with the value of the stock in the reorganized Northern Pacific Railway Co.—

Senator Kendrick (interposing): Might I ask right there just for a date? Under what plan of reorganization did the Northern Pacific Railway Co. first come into existence?

Mr. McGowan: The reorganization plan is dated March 16, 1896 (pp. 2829, 2854). The Northern Pacific Railway Co. grew out of the old Superior & St. Croix Co. That company was revivified, you might call it. It had been dormant for a great many years. The stock of that company was increased to $155,000,000, the name changed to the "Northern Pacific Railway Co.," and that is the company that was a part of the 1896 reorganization and it is the present existing Northern Pacific Railway Co. The syndicate agreement is dated March 16, 1896 (p. 1979), and the agreement between J. P. Morgan & Co. and the Northern Pacific Railway Co. is dated July 13, 1896 (p. 1981).

Senator Kendrick: Was that supposed to represent a branch of the main line of the Northern Pacific, the St. Croix Railroad?

Mr. McGowan: Well, there is a long history in connection with that, Senator Kendrick.

Senator Kendrick: I do not care to divert your attention to another point at all, but I had supposed that that was a branch of the Northern Pacific.

Mr. McGowan: The old Superior & St. Croix—I will not go into all the details.

Senator Kendrick: Extending from Duluth to St. Croix?

Mr. Kerr: It is covered, Senator, completely by one of the statements which I have filed here. The Superior & St. Croix Railroad Co. was created by a special act of the Legislature of Wisconsin in 1870, to build a road from St. Croix River to Superior, with a branch to Duluth or the Minnesota State line.

Senator Kendrick: What was the relative length of the road?—

Mr. Kerr: It was 150 or 200 miles long. They never built any road at all until after the name was changed to the "Northern Pacific Railway Co." It is a long and very complicated story and it is all in the record.

Mr. McGowan: The only material point on that, Senator, is this: That long prior to the reorganization of the Northern Pacific in 1896, 3,800 shares of stock of the old

Superior & St. Croix had been voted by the Northern Pacific Railroad Co. Now, as the years rolled by and in 1896 when that property, which ostensibly was the property of the Northern Pacific Railroad by reason of the stock ownership, in the proceedings in connection with the putting of new life into that old company the Northern Pacific Railway took the position that the Northern Pacific Railroad did not own the 3,800 shares of stock, notwithstanding the fact that in the earlier days the Northern Pacific Railroad had in fact voted that stock at one of the meetings of the old Superior & St. Croix.

Senator Kendrick: I just wondered why the main line had to do with that particular and apparently unimportant branch of the road.

Mr. McGowan: Well, you see the substance of that is this, that when it was proposed to reorganize the Northern Pacific in 1896 they had to get some company to reorganize on. The reorganizer had to have a charter for the purpose of starting off the new company, to take over the old Northern Pacific Railroad. Then they went back and found this Superior & St. Croix, in which the stock had been voted by the Old Northern Pacific. Then they revivified that company, as I said before, increased the stock to $155,000,000, changed the name to the Northern Pacific Railway Co. and went on with the reorganization.

This is an affidavit filed by Charles H. Coster, of the house of J. P. Morgan & Co., in the 1896 reorganization proceedings. I shall not read the whole affidavit but will ask that it be printed at the end of today's hearings (p. 4690). It has to do with Mr. Coster's statement at the time of the reorganization of 1896, and comments upon the relationship between the stock of the old company and the stock of the new company.

Mr. Kerr: Where does that appear?

Mr. McGowan: That appears at page 433 of volume 3 of the foreclosure suit of the *Farmers' Loan & Trust Co.* v. *Northern Pacific Railroad Co.* Mr. Coster says:

The price at which the common stock of the new company was offered to the holders of the common stock of the old company was fixed solely with reference to the expected value of the stock of the new company and the anticipated market value thereof; and the price at which the common stock of the new company and the preferred stock of the new company was offered to the holders of preferred stock of the old company was fixed solely with refer-

ence to the expected value of such common and preferred stock and the anticipated market value thereof, and in consideration of the transfer to the reorganization managers by the holders of the preferred stock of the old company of equitable rights in $3,347,000 of the consolidated mortgage bonds of the company, and in lands of the old company east of the Missouri River, comprising upward of 4,000,000 acres of land, of which bonds and lands special rights were asserted by the holders of the preferred stock of the old company, and which rights were transferred to the reorganization managers by all of such preferred stockholders as should purchase the common and preferred stock of the new company under the terms of the plan and agreement.

All of these points show the relationship—

The Chairman (interposing): Who was that affiant?

Mr. McGowan: Charles H. Coster, of the house of J. P. Morgan & Co. At the end of the Coster affidavit is a copy of the syndicate agreement of March 16, 1896, between Morgan, the Deutsche Bank, and others. I do not think it will be necessary to reprint that, as a copy of this syndicate agreement is already in the record at page 1979 of the hearings.

Mr. Kerr: Let it read, "Here follows the syndicate agreement appearing at page 1979 of the printed record."

Mr. McGowan: Yes. Now, just a word as to the present status of the Northern Pacific Railroad Co. The Northern Pacific Railroad Co., after the transfer of all the assets to the Northern Pacific Railway Co., proceeded to hold its meetings—of course, it is nothing now but a shadow corporation, but it does hold its annual meetings and elects officers and does have offices in New York in the same room with the Northern Pacific Railway Co. That corporation, the old Northern Pacific Railroad Co., is being kept alive. I make that observation because, if the committee will recall, when Judge Bunn was on the stand, as I construed his statement, he took the position that he did not know just exactly what this Northern Pacific Railroad Co. was now doing. It is a company having life, holding the election of officers right today, although it has no assets.

Senator Kendrick. How long has that activity continued?

Mr. McGowan: Ever since 1896.

Senator Kendrick: Clear down to the present day?

Mr. McGowan: Right today; yes.

Senator Kendrick: The Northern Pacific Railroad Co.?

Mr. McGowan: The Northern Pacific Railroad Co.; yes.

Mr. Kerr: There are, Senator, a number of old stockholders of the Northern Pacific Railroad Co. who did not see fit to take part in the reorganization of 1896, and they have had a suit pending in the United States Court for the District of New York for more than 20 years against the Northern Pacific Railroad Co. and the Northern Pacific Railway Co., and it is therefore for that reason at least that it seems proper to keep alive the organization of the railroad company.

The Chairman: That suit is dormant?

Mr. Kerr: Yes. Many efforts have been made by the defendant to bring it on, but it has been brought by these Philadelphia stockholders who were represented by someone who appeared at the hearings a year ago—made no formal appearance but attended the hearings. If you will remember, in the old briefs the name of Judge McCullen was referred to, and his briefs were put into the record. He was the attorney of record in that case for the plaintiffs.

Mr. McCowan: And in that connection I would like to make a statement for the benefit of the record concerning Judge McCullen. At the hearings of last spring a gentleman appeared here at the hearings by the name of Mr. Dougherty. He was unknown to me at that time, although later during the hearings I became acquainted with him. He turned out to be a representative of Judge McCullen. Mr. Dougherty was a stenographer and typewriter as well as a lawyer, and he, through the information that Judge McCullen had given him, had considerable data in connection with the Northern Pacific. Judge McCullen had been familair with the Northern Pacific case from the angle of the stockholders' suit for a great many years. At the conclusion of the hearings the suggestion was made to me, I think it was by Judge Raker, that Mr. Dougherty was young and able and energetic, and in view of the fact hat the committee had authorized me to make some inquiries in connection with the books of the company, he might prove to be an able assistant. Judge Raker left the matter to my discretion, however. After the hearings were over I made a trip over to Philadelphia and

had a talk with Judge McCullen about the case. Judge McCullen is on the bench in Philadelphia. He is a lawyer of ability and standing, and, so far as I know, is a man of the highest integrity.

After I returned from Philadelphia I deliberated over the advisability of having Mr. Dougherty accompany me on my trip of inquiry in connection with the Northern Pacific books. I finally concluded that I would not have Mr. Dougherty go with me, and I did that for two reasons: First, I did not want anybody to have any semblance of anything that would lead to the conclusion that my case was tied in any way with this old case of the stockholders, and in addition to that—and this reason was of equal importance—I felt that when the committee had authorized me to go and make the inquiry into the books of the company, I should preserve whatever authority was given to me with the greatest care, and I felt that, although there was this difference of opinion between the Government and the Northern Pacific in connection with this land grant I should not permit an antagonistic outfit—that is, an outfit that was antagonistic to the Northern Pacific—to appear with me and look at the books of the company at the same time. I did not think that such action as that would meet with the favor of the committee, and certainly after considering it, it did not meet with my approval. I felt that while we were scrapping the Northern Pacific, I wanted to be honorable and upright and fair with them, and consequently I decided I would not let the other fellow come in by the back door, as if to use the power of the committee to look at the books of the company as it might be construed when they could not do it possibly in another way.

I have stated this rather crudely, but that is the substance of the situation, and for that reason I thought it best not to have Mr. Dougherty accompany me, and he did not accompany me.

I went on trips to New York and St. Paul, where I looked into the books of the Northern Pacific to some extent, and then returned to Washington. Now, in making this observation I make it in no spirit of hostility at all to Judge McCullen or to what the merits may have been of his controversy with the Northern Pacific. He is an able man and knows what is best from his own standpoint.

Mr. Kerr: I want to say, Mr. McGowan, I think your action was highly creditable.

Mr. McGowan: Thank you, Mr. Kerr, I tried to deal fairly with you on that point.

After I came back from St. Paul I went again to Judge McCullen—now, mind you, I was, of course, trying to get all the information I could from Judge McCullen or anybody else in this matter. There was some discussion in Judge McCullen's office over there in Philadelphia, and I had to take the position there with Judge McCullen that I could not talk with him about any of the data that I had gathered from the books of the Northern Pacific, although I would be glad to take anything that he had and look it over for the purpose of seeing whether or not it had any bearing on the matter from my standpoint.

Well, to make a long story short and to make it perfectly clear to Judge McCullen, and notwithstanding any position I took that if he had anything to tell the committee I thought the committee would be glad to hear it, and along that line a letter was addressed to Judge McCullen on April 3, 1926, as follows—this was written, signed by Judge Sinnott:

Hon. J. P. McCullen,
City Hall, Philadelphia, Pa.

Dear Mr. McCullen: The hearings in connection with the Northern Pacific land grant will be resumed at Washington, D. C., on April 14. The committee extends to you an invitation to appear before it for the purpose of presenting such testimony as you may desire to offer.

This invitation is sent to you at the suggestion of Mr. McGowan.

Sincerely yours,
N. J. SINNOTT,
Chairman Joint Committee to Investigate
Northern Pacific Land Grant.

Judge McCullen—he is a busy man—for some other reason that was satisfactory to him, did not see fit to come down, but Mr. Boylan, one of his associates, has been at the hearings since they started this spring. Mr. Boylan has handed to me a memorandum which comes from Judge McCullen in connection with this matter, and asks that I propound this question to Mr. Kerr. I have no objection

to doing that, but Mr. Boylan is here in the room, and perhaps he would rather ask that question.

Mr. Thomas Boylan: I think the question should be given by you to the committee, Mr. McGowan, if it has any relevancy. I do not think I should interfere in any way, because I have no standing here. Won't you ask it, Mr. McGowan, if you think it is of enough importance?

Mr. McGowan: The only hesitancy I have about asking the question is that I have not sufficient familiarity with the matter referred to, the particular item referred to, to know the surroundings. Judge McCullen, as I understand it, thinks that the question he asks has some bearing on the matter. I have no objection to asking it, and I will read the memorandum as Mr. Boylan has presented it, and then leave it to the committee to decide whether they want Mr. Kerr to answer it or not. The following is the question:

On August 27, 1897, there was filed with the Interstate Commerce Commission a report of the Northern Pacific Railroad Co. (stated by the receiver) for the two months ending August 31, 1896.

Page 49 of this report is the comparative balance sheet. On this page, under the caption "Other assets", appears an item "Assets transferred to Northern Pacific Railway Co., $2,769,441.91".

There is no explanation of this item given in the report. I ask counsel for the Northern Pacific Railway Co. to furnish complete information as to what this entry represents and what relation it bears to the land grant to the Federal corporation. What relation, if any, exists between this item of $2,769,441.91 and the $2,775,000 stated to be the holdings of the Northern Pacific Railway Co. in the Northwestern Improvement Co. in or about 1908?

That is the question that is propounded by Mr. Boylan.

Mr. Kerr: Perhaps a short cut to the solution of whether the question shall be asked will be my voluntary statement that I don't know anything about it.

The Chairman: Can you ascertain that?

Mr. Kerr: It is possible that I can. I don't know.

The Chairman: I wish you would see what you can ascertain about that.

Mr. Kerr: I will do that.

Mr. McGowan: Mr. Boylan hands me the following additional question which he asks be incorporated in the question to Mr. Kerr, as follows:

Is it not a fact that in the Northern Pacific system there were certain underlying preferred stocks having a lien upon the land grant of the Northern Pacific Railroad Co. and of a portion of the land grant of the St. Paul & Pacific in Minnesota, and also certain land-grant bonds upon said land grants of said companies; and were these not used as basic securities prior to the reorganization of 1875, and subsequently to that reorganization down to and including the present time, notwithstanding the reorganization of 1896?

Mr. Kerr: So far as the Northern Pacific is concerned I can answer that, I think, in the negative; so far as the St. Paul & Pacific is concerned, I have no information whatever.

In the National Power and Paper Company case, 122 Minn. 355, 142 N. W. 820, the Court held that after a suit brought by a corporation to cancel a fraudulent issue of its stock was collusively dismissed by the directors, then the stockholders could move to vacate the dismissal and prosecute the action, and the decision is sustained by numerous citations.

In *Morgan's Louisiana & Texas R. & S. Co.* v. *Texas Central R. Co.,* 137 U. S. 171, at 201, 34 L. Ed. 625, at 635, the Court said: "'A cross bill,' says Mr. Justice Story (Eq. Pl. sec. 389), '*ex vi terminorum* implies a bill brought by a defendant in a suit against the plaintiff in the same suit, or against other defendants in the same suit, or against both, touching the matters in question in the original bill. A bill of this kind is usually brought, either (1) to obtain a necessary discovery of facts in aid of the defense to the orignal bill, or (2) to obtain full relief to all parties, touching the matters of the original bill.' And as illustrative of cross bills for relief, he says (sec. 392): '*It also frequently happens, and particularly if any question arises between two defendants to a bill, that the court cannot make a complete decree without a cross bill or cross bills, to bring every matter in dispute completely* before the court, to be litigated by the proper parties, and upon the proper proofs.'

"It seems to us that in order that a decree might be made upon the whole matter in dispute, brought completely before the court, the *bill* in question *was necessary* and was *correctly styled a cross bill.* In no proper sense

were new and distinct matters introduced by it, which were not embraced in the original and amended and supplemental bills, and while it sought equitable relief, it was such as, in point of jurisdiction over the subject matter, the court was competent to administer. It may be that, so far as it sought the further aid of the court beyond the purposes of defense to the original bill, it was not a pure cross-bill, but that is immaterial. The subject matter was the same, although the complainant in the cross-bill asserted rights to the property different from those allowed to it in the original bill, and claimed an affirmative decree upon those rights. A complete determination of the matters already in litigation could not have been obtained except through a cross-bill, and different relief from that prayed in the original bill would necessarily be sought. This bill was filed, on leave, before the testimony was taken, and though there should be as little delay as possible in filing bills of this kind, yet that was a matter entirely within the discretion of the court, which could have directed it to be filed even at the hearing. And whether this bill be regarded as a pure cross-bill, as an original bill in the nature of a cross-bill, or as an original bill, there is no error calling for the disturbance of the decree because the court proceeded upon it in connection with the other pleadings. The jurisdiction of the Circuit Court did not depend upon the citizenship of the parties, but on the subject matter of the litigation. The property was in the actual possession of that court, and this drew to it the right to decide upon the conflicting claims to its ultimate possession and control. *Milwaukee & M. R. Co.* v. *Soutter,* 69 U. S. 2 Wall. 609 (17:886); *People's Bank* v. *Calhoun,* 102 U. S. 256 (26:101); *Krippendorf* v. *Hyde,* 110 U. S. 276 (28:145)."

In *Neal* v. *Foster, et al.* (C. C., Oregon), 34 Fed. 496, the Court held that a cross bill is a mode of obtaining relief or making a defense to which a defendant may resort as against the plaintiff or a co-defendant in the original bill, without leave of the Court, and the question of his right to file the same when and as it may be done, may be made and determined on demurrer.

In *Guarantee Trust & Safe Deposit Co.* v. *Duluth & W. R. Co., et al.* (C. C. Minnesota), 70 Fed. 803, it was held that where it was alleged that the directors for the pur-

pose of sacrificing the interests of the stockholders, refuse to defend a suit, a court of equity will permit the stockholders to intervene and become parties defendant and file an answer *and cross bill* so as to protect their own interests and the interests of the other stockholders who may choose to join them in the defense.

The text in 21 Corpus Juris. 503, states that a cross bill may be filed "after the hearing, if justice requires", citing *Cartwright* v. *Clark,* 4 Metc. (Mass.) 104; *Roberts* v. *Peavey,* 29 N. H. 392, but the text states that this is not ordinarily the rule. The text at 504 states: "One who has been impleaded in a suit and whose interest is admitted by the pleadings cannot be deprived of the right to file a cross bill therein at any time it becomes necessary to protect his interest," citing *Ulman* v. *Iager,* 155 Fed. 1011 (S. D. W. Va.), which *sustains the text* in an *opinion by Judge Dayton* and held that while a cross bill cannot be maintained in a suit after it has been settled, a tenant in common who has been impleaded in a suit between the co-tenants to establish the interest of each and obtain partition, and whose interest is admitted by the pleadings, *cannot be deprived of the right to file a cross bill therein at any time it may become necessary to protect his interest in the property* by a settlement between his co-tenants.

New parties may be brought in by a cross bill which seeks affirmative relief, and is not merely defensive, when they are necessary to the granting of such relief, and Judge Dayton said: "Again, it is the very touchstone of equity jurisprudence that, having taken jurisdiction, it will administer plenary justice to all parties who may have interests in the subject-matter according to their right. No controversy is ever 'settled' or ended in that court until all such rights and interests are fixed and determined by its decree, and this is true regardless of the time and delay involved in its doing so. A court of equity recognizes neither laches nor limitation in its own administration. I am, therefore, constrained to hold this first ground of demurrer untenable."

In *Hough* v. *Wat*son, 91 W. Va. 161, 112 S. E. 303, where many years after a suit was filed, an answer and cross bill were filed and demurrer was sustained to the an-

swer and cross bill by the lower court, and same was reversed on appeal.

In *Ogden* v. *Gilt Edge Consol. Mines Co.,* 225 Fed. 723, at 728 (C. C. A. 8), the Court held and stated: "That stockholders of a corporation may, in equity, either sue for or defend on behalf of the corporation, if the directors fraudulently fail to do so, or where they are the beneficiaries of the action, is a well recognized principle of equity jurisprudence. *Hawes* v. *Oakland,* 104 U. S. 450, 26 L. Ed. 827; *Bronson* v. *LaCrosse R. Co.,* 2 Wall. 283, 17 L. Ed. 725; *In re* Swofford Brothers D. G. Co. (D. C.), 180 Fed. 549, 553.

"Equity rule 27, formerly 94 (198 Fed. xxv. 115 C. C. A. xxv), which requires certain preliminary steps to be taken by the stockholder before bringing his suit, will be dispensed with when the interests of the directors are antagonistic to those of the corporation, where this fact is shown by the pleadings. *Delaware & Hudson Co.* v. *Albany & Susquehanna R. R. Co.,* 213 U. S. 435, 29 Sup. Ct. 540, 53 L. Ed. 862. The allegations in the petition for leave to intervene, and the proposed answer made a part thereof, clearly show such a condition of affairs as to justify stockholders to intervene and defend on behalf of the corporation, when the directors, charged with the protection of the corporate property, are adversely interested, and not only refuse to defend, but confess judgment, as is alleged in the proposed answer and as is shown by the record to have been done. If the allegations in the proposed answer were not specific enough in charging fraud against the directors, a motion to make more specific would have been proper. But, in any event, when the petition for leave to intervene was denied upon that ground it was the duty of the court to permit an amendment when requested by the parties. It is well settled that in equity proceedings the parties are entitled to a reasonable time to amend their pleadings. A refusal to grant such leave is error. *Files* v. *Brown,* 124 Fed. 133, 142, 59 C. C. A. 403, 413; *In re* Broadway Savings Trust Company, *supra.*"

Fitzwater v. *Nat. Bk. Seneca,* 62 Kan. 163, 61 Pac. 684, held: "The stockholders of a corporation who allege that their company has a valid defense to a suit brought against it, but which its managing officers wrongfully or fraudulently refuse to make, are entitled to intervene in

the suit and defend for the company, upon their tender of an answer stating valid matters of defense to the action, and the making of a showing, by evidence, of reasonable grounds to believe that such defense can be finally proved upon a trial of the case, and that the officers whose duty is to make it are wrongfully or fraudulently refusing to do so."

(Syllabus by the Court.)

In *Secor* v. *Singleton,* 41 Fed., at 727 (C. C. Mo.) Judge Thayer said and held: "Although the bill was filed by stockholders of the railway company, they did not sue to enforce an individual right, but solely to enforce a right or immunity that pertained to the corporation. *The suit was essentially a suit by the corporation* against the counties that the *stockholders were allowed to prosecute in its behalf,* because the directors had been negligent in asserting the right of the corporation. *Dodge* v. *Woolsey,* 18 How. 331; *Memphis* v. *Dean,* 8 Wall. 73. Inasmuch, then, as the suit was, in effect, a suit by the railway company against the counties, and was likewise an equity proceeding, it is wholly immaterial how the parties were arranged upon the record. The decree rendered was certainly a conclusive adjudication, between the company and the counties, that the property of the former was exempt from taxation, and in a suit between them might be invoked as an estoppel."